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SUPREME COURT OF THE UNITED STATES.

No. 771.

JESSE H. SETTLEMIER, PLAINTIFF IN ERROR,

vs.

WILLIAM J. SULLIVAN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

FILED SEPTEMBER 16, 1878

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1 *Complaint.*

In the Circuit Court of the United States for the District of Oregon.

WILLIAM J. SULLIVAN, PLAINTIFF,
vs.
JESSE H. SETTLEMIRE, DEFENDANT. } Ejectment.

The above-named plaintiff complains of the said defendant, and shows to the court the following facts, which constitute his cause of action:

First. That the said plaintiff is a citizen of the State of California, and that the said defendant is a citizen of the State of Oregon.

Second. That the said plaintiff is the owner in fee simple of the following-described real estate, to wit, situated in Marion county and State of Oregon and in township five south, ranges one and two west of the Willamette meridian, and beginning at a point 10^{27} chains north of the southwest corner of section seven in township five south, range one west of the Willamette meridian, in said county and state; running thence south 77° E. 76^{93} chains;

2 thence south 20½° west on the east line of claim No. 64, in township five south, range one west, 19^{59} chains, more or less, to the north line of the tract of land deeded by W. B. Magers to Joseph Hebert; thence north 87° W. on the said north line, the said Hebert's tract, 71^{24} chains to the west line of claim 80 of said township five south, range two west; thence north 8^{37} chains; thence west 8^{00} chains; thence north 25^{87} chains; thence south 77° E. 11^{61} chains to the place of beginning, containing 214 acres, more or less, and being the north part of the donation land-claim of John B. Ducharm and wife, notification 877, and said claims Nos. 64 and 80, in said townships.

Third. That the said above-described premises are of the value of ten thousand dollars.

Fourth. That the said plaintiff is entitled to the immediate possession of the said described premises.

Fifth. That the said defendant wrongfully withholds the said premises and the possession thereof from the said plaintiff,

3 to his damage in the sum of three thousand dollars.

Wherefore plaintiff demands judgment against said defendant for the said premises—for the possession thereof—for the sum of three thousand dollars for the wrongful withholding of the same from the plaintiff, and for his costs and disbursements herein expended.

P. C. SULLIVAN,
Attorney for the Plaintiff.

UNITED STATES OF AMERICA,
DISTRICT OF OREGON. } *ss.*

I, P. C. Sullivan, being duly sworn, do depose and say, that I am the attorney above named for plaintiff, and that the foregoing com-

plaint is true, as I believe, and I make this affidavit for the reason that the said plaintiff is not within the district of Oregon.

P. C. SULLIVAN.

Subscribed and sworn to before me, this 24 day of March, A. D. 1877. RALPH WILCOX, *Clerk.*

(Endorsed:) Wm. J. Sullivan, pl'ff., vs. Jesse H. Settlemire, def't. No. 354. Circuit Court of United States for the District of Oregon. Complaint. Filed March 24, 1877. Ralph Wilcox, clerk. P. C. Sullivan, att'y for plaintiff.

4 *Summons.*

In the Circuit Court of the United States for the District of Oregon.

WILLIAM J. SULLIVAN, PLAINTIFF, *vs.* JESSE H. SETTLEMIRE, DEFENDANT, } Summons.

The President of the United States of America to the marshal of of said district or his deputy, greeting:

You are hereby commanded that you summon Jesse H. Settlemire to be and appear in the Circuit Court of the United States for the District of Oregon, to be holden at Portland, in said district, to answer unto William J. Sullivan in an action at law, and that if he fail to answer the complaint therein, the plaintiff will take judgment for possession of the premises described in the complaint, for $3,000 damages for wrongfully withholding the same, and for costs and disbursements.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of the said circuit court hereto affixed, this 24th day March, A. D. 1877.

[SEAL.] RALPH WILCOX, *Clerk.*

(Endorsed:) No. 354. U. S. Circuit Court, Oregon. William J. Sullivan vs. Jesse H. Settlemire. Summons. Returned and filed March 29th, 1877. Ralph Wilcox, clerk.

5 UNITED STATES OF AMERICA, DISTRICT OF OREGON. } *ss.*

To whom it may concern:

Know ye, that by virtue of the authority in me vested as marshal of the United States for the district of Oregon, I have appointed Henry Hedges, of Woodburn, Marion co., my special deputy, and I do hereby depute and authorize him to make due service and return of the foregoing and annexed summons and copy of complaint, and the said service having been duly completed, this appointment to terminate.

Witness my hand, at Portland, in said district, this 26th day of March, A. D. 1877. A. W. WATERS,

United States Marshal, District of Oregon.

5½ DISTRICT OF OREGON, *ss.*

In obedience to the command of the within writ, I have served the same upon the therein-named Jesse H. Settlemire by exhibiting same to him, and by delivering to him personally, a true copy thereof, duly certified to me as U. S. marshal of said district, together with a copy of the complaint in the within action. Marion county, in said district, on the 27th day of March, A. D. 1877.

ABNER W. WATERS, *U. S. Marshal,*
By HENRY HEDGES, *Sp. Deputy.*

6 *Answer.*

In the Circuit Court of the United States for the District of Oregon.

WILLIAM J. SULLIVAN, PLAINTIFF,
vs.
JESSE H. SETTLEMIRE, DEFENDANT. } Ejectment.

The above-named defendant, for answer to the complaint of the plaintiff on file herein denies:

That the said plaintiff is the owner in fee simple or otherwise of the premises described in the complaint or of any part thereof, or has any estate, right, title, or interest therein, or that the said plaintiff is entitled to the immediate possession, or to any possession, of the said premises or of any part of the same, or that the defendant wrongfully withholds the said premises or any part thereof, or any possession of any part of the same, from the plaintiff to his damage in the sum of three thousand dollars, or in any sum whatever, or that he wrongfully withholds any part of the said premises from the said plaintiff.

And for a further and separate answer and defence to the
7 complaint of plaintiff the defendant alleges and shows to the court:

I. That the said defendant was at the commencement of this action, and for a long time prior thereto, and still is the owner in fee simple, and entitled to the immediate possession, and was and still is in the actual possession of the whole of the premises described in the complaint, with the following exceptions, to wit:

1. That the defendant has heretofore conveyed to the Oregon and California Railroad Company a strip of land 100 feet in width, being 50 feet in width on each side of and parallel with the central line of the main track of the Oregon and California railroad through and across the northern portion of the premises in complaint described, for the purpose of building, maintaining, and operating a railroad thereon forever.

2. That the said defendant has also conveyed to the said Oregon and California Railroad Company the following described parcel of ground located upon said premises, to wit: Commencing at the intersection of the centre line of the main track of the Ore-
8 gon and California railroad, and the north line of premises in

Sec. 18, T. 5 S., R. 1 W., and running thence westerly along north line to a point 50 feet distant from the centre line of railroad track, at right angles therewith, thence southwesterly parallel with railroad track 1,000 feet, thence southeasterly at right angles with railroad track 200 feet to a point 150 feet southeasterly of centre of railroad track, 1,000 feet to a point southeasterly of point of beginning, thence westerly to place of beginning.

3. That defendant, as proprietor of the premises in dispute, did, on the 30th day of August, 1871, lay out the town of Woodburn on said premises, and record a plat thereof in the records of Marion county, Oregon, and did duly dedicate to the inhabitants of said town forever the use of the necessary avenues, streets, and alleys therein, as appears by the recorded plat of said town, which dedication was duly accepted.

4. That the defendant has heretofore sold and conveyed the following described lots in the said town of Woodburn, according to the recorded plat thereof, to wit: lots 1, 3, and 6 in block 1; lots 3, 4, 5, and 6 in block 2; lots 1, 2, 3, 4, 7, and 8 in block 3; and lots 1, 2, 3, 4, 5, 6, 7, and 8 in block 4.

5. That the defendant has also heretofore sold and conveyed the following described tract of land included within the premises in complaint described, to wit: Beginning at a point 150 feet perpendicular to and from the centre of, and on the southeast side of the main track of the Oregon and California railroad, and 30 feet from the centre of and perpendicular to the county road leading from the station of Woodburn to Townsend's lane, and running thence N. 41¼° east, parallel with said railroad (the main track), 6.41 chains, thence S. 58½° east 17.40 chains, thence S. 41¼° W. 5.91 chains to B. Brown's line, thence westerly on said Brown's line 1.10 chains to the northeast edge of said county road, thence N. 58½° W. on the N. E. edge of said county road 16.30 chains to the place of beginning, containing eleven (11) acres, more or less.

6th. That the defendant has also heretofore sold and conveyed the following described tract or parcel of land included within the premises described in the complaint, to wit: Beginning at the northeast corner of claim No. sixty-four (64), township five (5) south, range one (1) west, and running thence north seventy-seven degrees (77°) west two and $\frac{22}{100}$ ($2\frac{22}{100}$) chains, thence south forty-one and ¼ degrees (41¼°) *degrees* west twenty-four and $\frac{85}{100}$ ($24\frac{85}{100}$) chains to the south line of J. H. Settlemire's land, thence south eighty-seven (87) degrees east ten and $\frac{65}{100}$ ($10\frac{65}{100}$) chains to the southeast corner of said Settlemire's land, thence north twenty and ½ (20½°) degrees east nineteen and $\frac{59}{100}$ ($19\frac{59}{100}$) chains to the place of beginning, and containing twelve and $\frac{86}{100}$ ($12\frac{86}{100}$) acres, more or less.

II. That the defendant is not now in the possession of any of the above-excepted tracts or parcels of land and disclaims all right to the possession of the same or any part thereof.

And for a further and separate answer and defence to the complaint of the plaintiffs, the defendant alleges and shows to the court:

I. That since the said defendant has been in possession of the said land, he has made permanent and valuable improvements thereon of the value of $6,275.00, and the defendant will set off the value of said improvements, or so much thereof as may be
11 necessary, against any damages that the plaintiff may establish against him in the trial of said action for the withholding of said premises or any part thereof.

Wherefore the defendant prays judgment against the said plaintiff, that he, the said defendant, is the owner and entitled to the possession of the premises described in the complaint, with the exceptions above set out, and for his costs and disbursements.

DOLPH, BRONAUGH, DOLPH & SIMON,
AND SYL. C. SIMPSON,
Attys. for Deft.

UNITED STATES OF AMERICA, }
DISTRICT OF OREGON. } *ss.*

I, Jesse H. Settlemire, being first duly sworn, say that I am the defendant in the above-entitled action, and that I verily believe the foregoing answer to be true. J. H. SETTLEMIRE.

Subscribed and sworn to before me, this April 6th, 1877.
RALPH WILCOX, *Clerk.*

(Endorsed:) No. 354. In the Circuit Court of the United States for the District of Oregon. Wm. J. Sullivan, plff., vs. J. H. Settlemier, deft. Answer. Filed April 16, 1877. Ralph Wilcox, clerk, by Ed. Wilcox, deputy. Dolph, B., D. & Simon & Syl. C. Simpson, deft's attys.

12 *Motion.*

In the Circuit Court of the United States for the District of Oregon.

WILLIAM J. SULLIVAN, PLAINTIFF,
vs.
JESSE H. SETTLEMIRE, DEFENDANT.

The above-named plaintiff comes now and shows the court that said defendant's answer filed herein shall be made more specific, so as to show whether or not the said improvements mentioned therein as of the value of $6,275.00, were made upon that portion of the premises described in the plaintiff's complaint, to which the said defendant disclaims title or right to possession.

W. LAIR HILL & P. C. SULLIVAN,
Attorneys for Plaintiff.

(Endorsed:) In the Circuit Court of the United States for the District of Oregon. William J. Sullivan, vs. Jesse H. Settlemire.

Motion to make more specific the answer. Filed April 19, 1877. E. N. Deady, clerk, pro. tem. Hill & P. C. Sullivan, attorneys for plaintiff.

13 *Reply.*

In the Circuit Court of the United States for the Districtof Oregon.

WILLIAM J. SULLIVAN, PLAINTIFF,
vs.
JESSE H. SETTLEMIRE, DEFENDANT. } Ejectment.

Replication.

The above-named plaintiff, for reply to the answer of the said defendant herein filed, denies:

That the said defendant was at the commencement of this action, or a long time prior thereto, or that he still is the owner in fee simple of the premises described in the plaintiff's complaint, or of any part thereof, and denies that said defendant is entitled to the possession thereof or of any part or parcel of the said premises.

Plaintiff avers that as to whether or not the said defendant has heretofore conveyed to the several parties mentioned in his said answer, the several parcels of the said premises as alleged in said answer the said plaintiff has not sufficient information to form a belief, and therefore denies the same.

14 And as to whether or not the said defendant is in possession of that part of said premises alleged in his said answer to have been sold and conveyed to the persons therein named, the said plaintiff has not sufficient information to form a belief, and therefore denies the same. Therefore plaintiff demands judgment as prayed for in his said complaint.

W. LAIR HILL & P. C. SULLIVAN,
Attorneys for Plaintiff.

UNITED STATES OF AMERICA,
DISTRICT OF OREGON. } *ss.*

I, P. C. Sullivan, being duly sworn, do depose and say, that I am the attorney above named, and that the foregoing reply is true as I believe, and I make this affidavit for the reason that the said plaintiff is not within the district of Oregon.

P. C. SULLIVAN.

Subscribed and sworn to before me, this 24th day of April, A. D. 1877.

EDWARD N. DEADY, *Clerk.*

(Endorsed:) In the Circuit Court of the United States for the District of Oregon. No. 354. William J. Sullivan vs. Jesse H. Settlemire. Replication. Filed April 24, 1877. Ed. N. Deady, clerk. Hill & P. C. Sullivan, attys. for plff.

15 *Motion.*

In the Circuit Court of the United States for the Districtof Oregon.

W. J. SULLIVAN *vs.* SETTLEMIRE. } Notice to set cause for trial.

To the above-named defendant and Messrs. Dolph, Bronaugh, Dolph and Simon, his attorneys.

You will please take notice that on Monday, the 12th day of November, A. D. 1877, at 10 o'clock A. M. of said day, plaintiff will move the court to set the above-entitled cause for trial.

P. C. SULLIVAN AND
HILL, DURHAM AND THOMPSON,
Atty's for Plff.

DIST. OF OREGON, *ss.*

Due service hereof by copy acknowledged, this 8th Nov., 1877.

E. C. BRONAUGH,
Of Atty's for Deft.

(Endorsed:) No. 354. In the Circuit Court of the United States for the District of Oregon. W. J. Sullivan vs. Settlemire. Notice to set cause for trial. Filed Nov. 9, 1877. R. H. Lamson, clerk. P. C. Sullivan & H., D. & T., attys. for plff.

16 *Order.*

In the Circuit Court of the United States for the District of Oregon.
October term, 1877.

Before the Honorable Matthew P. Deady, U. S. district judge for Oregon.

WILLIAM J. SULLIVAN *vs.* JESSE H. SETTLEMIRE. } No. 354. November 12 , 1877.

At this day it is ordered that this cause be set for trial on Tuesday, the 8th day of January, 1878.

17 *Order.*

In the Circuit Court of the United States for the District of Oregon.
October term, 1877.

Before the Honorable Matthew P. Deady, U. S. district judge for Oregon.

WILLIAM J. SULLIVAN *vs.* JESSE H. SETTLEMIRE. } No. 354. January 8th, 1878.

Now, at this day, comes the plaintiff by Messrs. George H. Durham and H. Y. Thompson, of counsel, and the defendant by Mr.

Septimus Huelat, of counsel, and said plaintiff moves the court for leave to file an amended reply, which motion is allowed by the court.

18 *Amended Reply.*

In the Circuit Court of the United States for the District of Oregon.

WILLIAM J. SULLIVAN, PLAINTIFF,
vs.
JESSE H. SETTLEMIRE, DEFENDANT. } Ejectment.

The above-named plaintiff for amended reply to the answer of defendant, made by leave of court first had and obtained, denies that the defendant was, at the commencement of this action, or for a long time prior thereto, or at any time, or that he still is, the owner in fee simple of the premises described in the complaint, or of any part or parcel thereof.

Plaintiff denies that the defendant is entitled to the possession of said premises, or any part or parcel thereof.

The plaintiff denies that since the said defendant has been in the possession of said lands in the complaint described, or at any time, defendant has made permanent or valuable improvements thereon of the value of $6,275, or of any other or greater value than $1,500. Wherefore plaintiff demands judgment as prayed in his complaint.

P. C. SULLIVAN,
W. C. JOHNSON & HILL,
DURHAM & THOMPSON,
Plff's Attys.

19 *Order.*

In the Circuit Court of the United States for the District of Oregon.
October Term, 1878.

Before the Honorable Matthew P. Deady, U. S. district judge for Oregon.

WILLIAM J. SULLIVAN
vs.
JESSE H. SETTLEMIRE. } No. 354. January 8th, 1878.

This being the day set for the trial of this cause, now come the plaintiff, by Messrs. George H. Durham, H. Y. Thompson, and Carey W. Johnson, and the defendant, by Messrs. J. N. Dolph, E. C Bronaugh, and Septimus Huelat; and now come the following jury to try the issue joined, viz: J. H. Jones, E. M. Burton, R. N. Worsham, Samuel Engle, William D. Ewing, Oliver Robbins, Henry Miller, Calvin H. Adams, R. D. Austin, Thomas G. Todd, John J. Morgan, and Richard C. Baldra, twelve good and lawful men of the district, who, being accepted by the parties, and being duly empanelled and sworn, proceeded to hear the statements of counsel and the evidence adduced.

20 *Order.*

In the Circuit Court of the United States for the District of Oregon.

WILLIAM J. SULLIVAN
vs.
JESSE H. SETTLEMIRE. } No. 354. January 9th, 1878.

Now, at this day, the parties to this cause appearing by their respective counsel as on yesterday, and the jury herein being in their places, and answering to their names, and having heard the evidence, the argument of counsel, and the charge of the court, without retiring, find the following verdict, which is received by the court and ordered filed, viz.: "We, the jury in the above-entitled action, find for the plaintiff, that he is the owner in fee simple and entitled to so much of the property and premises described in the complaint as the defendant defends for in his answer filed herein."

Whereupon it is ordered that defendant have thirty days in which to file a motion for a new trial and to prepare bill of exceptions.

21 *Verdict.*

In the Circuit Court of the United States for the District of Oregon.

WM. J. SULLIVAN, PLAINTIFF,
vs.
JESSE H. SETTLEMIRE, DEFENDANT. } Ejectment.

We, the jury in the above-entitled action, find for the plaintiff, that he is the owner in fee simple and entitled to the possession of so much of the property and premises described in the complaint as the defendant defends for in his answer filed herein.

(Endorsed:) No. 354. In the U. S. Circuit Court, Oregon. William J. Sullivan vs. Jesse H. Settlemire. Verdict. Filed Jan. 9, 1878. R. H. Lamson, clerk.

22 *Motion.*

In the Circuit Court of the United States for the District of Oregon.

W. J. SULLIVAN, PLAINTIFF,
vs.
J. H. SETTLEMIRE, DEFENDANT. }

Comes now the defendant above named and moves the court to set aside the verdict of the jury in this cause and to grant defendant a new trial herein, because of the following errors occurring at said trial:

1st. Error of the court in permitting the pretended deed from Jean Baptiste Ducharme and Catherine Ducharme to W. B. Magers to be read in evidence to the jury on plaintiff's behalf.

2d. Error of the court in permitting the deed from W. B. Magers to plaintiff to be read in evidence to the jury on plaintiff's behalf.

3d. Error of the court in permitting the testimony of the witness Wm. Darst to be given to the jury.

4th. Error of the court in permitting the two promissory notes of W. B. Magers to Saml. Walker and the complaint, notice,
23 and return thereto attached, to be read in evidence to the jury on plaintiff's behalf by way of rebuttal of the defendant's evidence.

5th. Error of the court in permitting the judgment entry in said cause of Saml. Walker vs. W. B. Magers to be read in evidence to the jury by plaintiff by way of rebuttal of defendant's evidence.

6th. Error of the court in permitting the copy of execution issued upon the said judgment in said action of Saml. Walker vs. W. B. Magers to be read in evidence by way of rebuttal of defendant's evidence.

7th. Error of the court in instructing the jury that said judgment is a nullity and is void.

8th. Error of the court in instructing the jury to find for plaintiff upon the issues joined in this action.

Wherefore defendant moves the court to set aside said verdict, and to grant him a new trial herein.

DOLPH, BRONAUGH, DOLPH & SIMON,
Attorneys for Defendant.

Service by copy acknowledged, this 4th day of March, 1878.
HILL, DURHAM & THOMPSON,
Of Plff's Attys.

(Endorsed:) In the Circuit Court of the Uniled States for the District of Oregon. No. 354. W. J. Sullivan, plff., vs. J. H. Settlemire, deft. Motion for new trial. Filed March 4th, 1878. R. H. Lamson, clerk. Dolph, B., D. & Simon, deft's attys.

24 *Order.*

In the Circuit Court of the United States for the District of Oregon.

WILLIAM J. SULLIVAN
vs. } No. 354. March 16th, 1878.
JESSE H. SETTLEMIRE.

At this day come the plaintiff, by Mr. W. Lair Hill, of counsel, and the defendant, by Mr. E. C. Bronaugh, of counsel, and on the suggestion of the court the hearing of the motion for a new trial filed herein is continued till the next term of this court.

WILLIAM J. SULLIVAN
vs. } No. 354. May 22d, 1878.
JESSE H. SETTLEMIRE.

Now, at this day, comes the plaintiff, by Mr. H. Y. Thompson, of counsel, and the defendant, by Mr. E. C. Bronaugh, of counsel; and this cause comes on to be heard on the motion for a new trial

filed herein, and the court having heard the argument of counsel and duly considered the same, it is ordered that said motion be, and the same is hereby, denied.

25 *Order.*

In the Circuit Court of the United States for the District of Oregon.

WILLIAM J. SULLIVAN } *vs.* } No. 354. May 23d, 1878.
JESSE H. SETTLEMIRE. }

Now, at this day, comes the plaintiff, by Mr. George H. Durham, one of his attorneys, and moves the court for judgment upon the verdict of the jury heretofore found.

Whereupon it is considered that the plaintiff is the owner of, in fee simple, and entitled to the possession of the lands described in the complaint, to wit: that certain tract or parcel of land lying in the county of Marion and State of Oregon, bounded by the following lines: beginning at a point ten chains and twenty-seven links (10.27 chs.) north of the southwest corner of section seven (7), in township five (5) south, of range one (1) west, of Willamet meridian, and running thence south seventy-seven degrees (77°) east seventy-six chains and ninety-three links (76.93 chs.); thence south twenty and one-half degrees west (20½°) on the east line of claim numbered sixty-four (64), in said township five south, range one west, nineteen chains and fifty-four links (19.54 chs.), more
26 or less, to the north line of the tract of land conveyed by N. B. Magers by deed to Joseph Herbert; thence north eighty-seven degrees west (87°) on said north line of the said land conveyed to Joseph Herbert seventy-one chains and twenty-four links (71.24 chs.) to the west line of claim numbered eighty (80) in township five south, of range two (2) west of Wallamet meridian; thence north eight chains and thirty-seven links (8.37 chs.); thence west eight chains (8.00 chs.); thence north twenty-five chains and eighty-seven links (25.87 chs.); thence south seventy-seven degrees east (77°) eleven chains and sixty-one links (11.61) to the place of beginning; said land being a part of the donation land-claim of John B. Ducharme and wife, notification numbered eight hundred and seventy-seven and designated as claim numbered sixty-four (64), being parts of sections seven (7) and eighteen (18), in township five south, of range one west of the Willamet meridian, and claim numbered eighty (80), being parts of sections twelve and thirteen, in township five south, of range two west of Willamet meridian; excepting the following parcels, of which the defendant disclaimed the right of possession and pleaded in his answer that he is not and
27 was not at the time of the commencement of this action in possession thereof, viz: a strip of land conveyed to the Oregon and California railroad company, one hundred feet in width, being fifty feet in width on each side of and parallel with the centre line of the main track of the California and Oregon railroad com-

pany through and across the northern portion of the premises above described; also the following tract of ground located on said first-described premises, to wit: commencing at the intersection of the centre line of the main track of the Oregon and California railroad and the northern line of said premises, in section eighteen, of township five south, range one west, and running thence westerly along the north line to a point fifty feet distant from the centre line of railroad track, at right angles therewith; thence southwesterly parallel with railroad track one thousand feet; thence southeasterly at right angles with railroad track two hundred feet, to a point one hundred and fifty feet southeasterly of centre of railroad track; thence one thousand feet to a point southeasterly of point of
28 beginning; thence westerly to place of beginning; also lots one, three, and six, in block one; lots three, four, five, and six, in block two; lots one, two, three, four, seven, and eight, in block three; and lots one, two, three, four, five, six, seven, and eight, in block four, in the town of Woodburn, on said first-described premises; also a tract of land included within the premises in the complaint described bounded by beginning at a point one hundred and fifty feet perpendicular to and from the centre of and on the southeast side of the main track of the Oregon and California railroad, and thirty feet from the centre of and perpendicular to the county road leading from the station of Woodburn to Townsend's land and running thence north forty-one degrees and fifteen minutes east parallel with said railroad (main track) six chains and forty-one links; thence south fifty-eight degrees and thirty-nine minutes east seventeen chains and forty links; thence south forty-one degrees and fifteen minutes west five chains and ninety-one links to *to* B. Brown's line; thence westerly on said Brown's
29 line one chain and ten links to the northeast edge of *of* said county road; thence north fifty-eight degrees and thirty minutes west on the northeast edge of said county road sixteen chains and thirty links to the place of beginning, containing eleven acres, more or less; also that certain parcel of land included within the premises described in the complaint, to wit: beginning at the northeast corner of claim numbered sixty-four, in township five south, range one west and running thence north seventy-seven degrees west two chains and twenty-two links; thence south forty-one degrees and fifteen minutes west twenty-four chains and eighty-five links to the south side of land claimed by J. H. Settlemire; thence south eighty-seven degrees east ten chains and sixty-five links to the southeast corner of said land claimed by said Settlemire; thence north twenty degrees and thirty minutes east nineteen chains and fifty-four links to the place of beginning, and containing twelve acres and eighty-six one hundredths of an acre, more or less; and that plaintiff have and recover *off* and from said defendant his costs and disbursements in this action taxed at ninety-seven dollars and eighty-six cents, and that he have execution therefor.

30 *Cost Bill.*

In the Circuit Court of the United States for the District of Oregon.

W. J. SULLIVAN
vs.
JESSE H. SETTLEMIRE.

Plff's. Bill of Disbursements.

Clerk's fees		$20 40
Marshal's fees		9 56
Atty's fees		20 00
Witness fees, viz:		
Wm. Darst	Days & miles—1 day & 38 miles & back.	5 30
James Casey	1 " 38 " "	5 30
A. Mathiatt	1 day & 37 miles & back.	5 20
G. B. Miller	1 " 40 " "	5 50
L. C. Magers	1 " 40 " "	5 50
Thos. Fitzgerald	1 " 40 " "	5 50
D. P. Thompson	1 day & 1 mile	1 60
Paid J. D. Magers for serving subpœnas		4 00
Disbursements for certified copies		10 00
		97 80

DISTRICT OF OREGON, *ss.*

I, W. Lair Hill, do swear I believe the foregoing bill of costs and disbursements to be in all respects correct.

W. LAIR HILL.

Subscribed and sworn to before me, this 29th day of May, 1878.

R. H. LAMSON, *Clerk.*

(Endorsed:) No. 354. In the the U. S. Circuit Court for Oregon. William J. Sullivan vs. Jesse H. Settlemire. Cost bill. Filed May 27th, 1878. R. H. Lamson, clerk.

31 *Bond.*

Supreme Court of the United States.

WILLIAM J. SULLIVAN, PLAINTIFF,
vs.
JESSE H. SETTLEMIER, DEFENDANT.

Know all men by these presents that we, Jesse H. Settlemier, the above-named defendant, and George Settlemier and George M. Settlemier, of Marion county, in the State of Oregon, are held and firmly bound unto William J. Sullivan, the above-named plaintiff, in the sum of fifteen hundred dollars, to be paid to the said William J. Sullivan, his executors or administrators. To which payment well and truly to be made we bind ourselves and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 1st day of June, A. D. 1878.

Whereas, the above-named Jesse H. Settlemier hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the Circuit Court of the United States for the District of Oregon.

31*a* Now, therefore, the condition of this obligation is such that if the above-named Jesse H. Settlemier shall prosecute his said writ of error to effect and answer all costs and all damages for the delay and for the detention of the property in controversy if he shall fail to make good his plea, then this obligation shall be void, otherwise to remain in full force and virtue.

J. H. SETTLEMIER. [L. S.]

GEORGE his × mark SETTLEMIER. [L. S.]

GEO. M. SETTLEMIER. [L. S.]

Sealed and delivered in presence of—

R. H. LAMSON.
WARD S. STEVENS.

UNITED STATES OF AMERICA, } ss.
DISTRICT OF OREGON. }

We, George Settlemier and George M. Settlemier, being duly sworn, say, on oath, each for himself and not for the other, that I am worth the sum of fifteen hundred dollars over and above all my just debts and liabilities and exclusive of property exempt from execution, and that I am a resident householder and free-holder within said district and State of Oregon.

GEORGE his × mark SETTLEMIRE.

GEO. M. SETTLEMIER.

Subscribed and sworn to before me, this 1st day of June, A. D. 1878.

[SEAL.] R. H. LAMSON,
Clerk U. S. Circuit Court for Oregon.

31*b* A true copy. R. H. LAMSON, *Clerk.*

(Endorsed:) No. 354. In the U. S. Circuit Court for Oregon. William J. Sullivan vs. Jesse H. Settlemier. Bond. Approved, Matthew P. Deady, district judge. Filed June 1, 1878. R. H. Lamson, clerk.

31*c* DISTRICT OF OREGON, *ss.*

I hereby certify that I have served the annexed citation in the suit of Wm. J. Sullivan vs. Jesse H. Settlemeier, upon the said William J. Sullivan, by delivering to George H. Durham, his attorney,

a true copy of said citation, at Portland, in said district, on the first day of June, A. D. 1878.

ABNER W. WATERS, *U. S. Marshal*,
By WIN. S. WATERS, *Deputy*.

32 *Citation.*

The United States of America to William J. Sullivan, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States for the District of Oregon, wherein Jesse H. Settlemier is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this first day of June, in the year of our Lord one thousand eight hundred and seventy-eight.

MATTHEW P. DEADY,
U. S. District Judge, Oregon.

(Endorsed:) No. 354. In the Circuit Court of the United States for the District of Oregon. William J. Sullivan vs. Jesse H. Settlemire. Citation. Filed June 1st, 1878. R. H. Lamson, clerk.

33 *Writ of Error.*

In the Circuit Court of the United States for the Ninth Judicial Circuit, District of Oregon.

WILLIAM J. SULLIVAN
vs.
JESSE H. SETTLEMIRE. } No. 354. Writ of error.

THE UNITED STATES OF AMERICA, *ss.*

The President of the United States of America to the honorable the judges of the Circuit Court of the United States for the Ninth Judicial Circuit, District of Oregon, greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before the Honorable Matthew P. Deady, one of you, between William J. Sullivan, plaintiff and defendant in error, and Jesse H. Settlemire, defendant and plaintiff in error, a manifest error hath happened to the great damage of the said plaintiff in error, as by his complaint doth appear; and we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send

the record and proceedings aforesaid, with all things concern-
34 ing the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being then and there inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States of America should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, and the seal of said circuit court affixed, at Portland, in said district, this twenty-ninth day of May, in the year of our Lord one thousand eight hundred and seventy-eight, and of the independence of the United States the one hundred and second.

[SEAL.] R. H. LAMSON, *Clerk.*

Allowed. MATTHEW P. DEADY, *District Judge.*

(Endorsed:) No. 354. In the Circuit Court of the United States for the Ninth Judicial Circuit, District of Oregon. William J. Sullivan vs. Jesse H. Settlemire. Writ of error. Filed June 1st, 1878. R. H. Lamson, clerk.

35 *Bill of Exceptions.*

In the Circuit Court of the United States for the District of Oregon.

WM. J. SULLIVAN, PLAINTIFF,
vs.
JESSE H. SETTLEMIER, DEFENDANT.

Be it remembered, that on the trial of the above-entitled action in the above-entitled honorable court, the plaintiff to show title in himself to the lands in controversy in this action, and to sustain the issue joined on his behalf in this cause, offered and proposed to read in evidence to the jury a duly certified copy of a patent from the government of the United States to John B. Ducharme and Catharine Ducharme, his wife, bearing date the 28th day of April, A. D. 1875, for the lands therein described, a true copy of which patent is hreunto annexed, marked "Exhibit A," and made part of this bill of exceptions, and there being no objection made thereto by the defendant's counsel, said patent was allowed to be read, and was read in evidence to the jury.

Plaintiff by his counsel then and next offered and proposed
36 to read in evidence to the jury a certified copy of a deed from Jean Baptiste Ducharme and Catharine Ducharme, his wife, to W. B. Magers, bearing date January 5th, A. D. 1858, a true copy of which deed and of the acknowledgment thereof and of the other endorsements thereon is hereunto attached, marked "Exhibit B," and made part of this bill of exceptions.

Defendant by his counsel objected to the reading of said deed to the jury, upon the ground and for the reasons that said deed does not appear to have been executed by the same persons named and described in said patent, and because no land is described in said deed; that the "premises" purporting to be thereby conveyed are not described as being in any state or county nor otherwise definitely located; and because said deed does not purport to convey any lands described in said patent, or in the complaint in this action, and said instrument of writing is therefore immaterial and said deed is void, and incompetent as evidence in this action, which objections of defendant's counsel were overruled by the court, and said deed was permitted by the court to be read, and was read in evidence to the jury, to which ruling of the court the defend-
37 ant by his counsel duly excepted at the time, and said exception was allowed by the court.

Plaintiff by his counsel then and next offered and proposed to read in evidence to the jury a deed from W. B. Magers to plaintiff, bearing date the —— day of ——, A. D. 1877, a true copy of which deed and of the acknowledgment and other endorsements thereon is hereunto attached, marked "Exhibit C," and made part of this bill of exceptions.

Counsel for defendant objected to the reading of said last-named deed to the jury, on the ground and for the reasons that no foundation had been laid therefor, and that the grantor in said deed had not been shown to have ever owned the land therein described; that said deed purports to have been acknowledged at an impossible date, to wit, on the 15th day of March, A. D. 187..., and that said instrument of writing is immaterial and incompetent as evidence in this action, which objections of defendant's counsel were overruled by the court, and said deed was by the court permitted to be read, and was read in evidence to the jury, to which ruling of the court counsel for defendant duly excepted at the time, and said exception was allowed by the court.

38 Plaintiff then introduced as a witness on his behalf, one William Durst, who being first duly sworn, testified in substance as follows: "I have lived in Marion county, Oregon, since 1847; I knew a man named Ducharme, did not know his first name; I know the land now occupied by defendant; Ducharme occupied the same place; I first knew him there in 1850."

Counsel for plaintiff then propounded to said witness the following question:

Q. How long did you know Ducharme as occupying the land now occupied by Settlemier, the defendant?

Counsel for defendant objected to said question on the ground that the evidence sought thereby to be elicited was incompetent and immaterial, which objection was overruled by the court, to which ruling defendant then and there excepted, and the witness answered as follows:

Ans. In the year 1850 Ducharme was not living on the land described in the complaint, but was living on another portion of the same donation claim, of which the land described in the complaint is a part. He lived there last in 1854.

39 Counsel for plaintiff then propounded to said witness the following question:

Q. Who went into possession of the land after Ducharme left it?

To which question defendant's counsel objected upon the same grounds as to the last preceding question, which objection was overruled by the court, to which ruling counsel for defendant duly excepted at the time. The witness being allowed by the court, answered as follows:

Ans. A man by the name of Edson claimed it when I was acting as deputy assessor in 1857.

Counsel for plaintiff then propounded to said witness the following question:

Q. Did Magers occupy the property?

To which question counsel for defendant objected as incompetent and immaterial, which objection was overruled by the court, and defendant duly excepted at the time. The witness being permitted by the court, answered as follows:

Ans. Yes, he did, from about 1858 until 1862.

Counsel for plaintiff then propounded to the witness the following question:

Q. Then who went into possession?

40 Ans. Settlemier then went into possession of the same tract of land claimed by Ducharme as a donation claim.

The foregoing was the whole of the evidence offered by plaintiff tending to establish his ownership of the land described in his complaint in this action.

The plaintiff having closed the evidence-in-chief on his behalf, and having rested, the defendant to sustain the issue herein joined on his behalf, and to establish his claim to the ownership of the land described in the complaint in this action, offered and was permitted by the court to read, and did read, in evidence to the jury the following writings and documentary evidence, to wit:

First. A duly certified transcript of a judgment of the Circuit Court of the State of Oregon for Marion County, rendered on the 17th day of September, A. D, 1861, in an action wherein Samuel Walker was plaintiff and W. B. Magers was defendant, a true copy of which transcript is hereunto attached, marked "Exhibit D," and made part of this bill of exceptions.

Second. A duly certified copy of an execution issued out of said Circuit Court of the State of Oregon for Marion County

41 upon said judgment, which execution bears date the — day of ———, A. D. 186–, and a true copy whereof is hereto attached, marked "Exhibit E," and made part of this bill of exceptions.

Third. A deed from the sheriff of Marion county aforesaid to Alexander A. Settlemier, bearing date March 25th, 1862, for the land described in the complaint, sold upon the aforesaid execution at sheriff's sale to satisfy said judgment, a true copy of which deed, and of the acknowledgment thereof endorsed thereon, and of the order confirming said sale and deed also thereon endorsed, is hereto attached and marked "Exhibit F," and made part of this bill of exceptions.

Fourth. The order of court approving and confirming said sale and deed, which is endorsed upon said deed.

Fifth. A duly certified copy of a deed from Alexander A Settlemier to defendant for the land described in the complaint, bearing date the — day of ———, 18—, a true copy of which deed, with the acknowledgment and other endorsements thereon, which were also read to the jury, is hereunto attached, marked "Exhibit
42 G," and made part of this bill of exceptions

The defendant having rested his case, the plaintiff by his counsel offered to read in evidence to the jury, by way of rebuttal, a duly certified copy of two certain promissory notes, purporting to have been executed by W. B. Magers to Samuel Walker or order; the *first*, dated July 7, 1860, being for the sum of one hundred dollars, bearing interest at two per cent. per month, payable ninety days after date; and the *second* for the sum of fifty dollars, with interest at two per cent. per month, bearing date Sep. 17, 1860, and payable ninety days after date; together with a duly certified copy of a complaint in an action upon said promissory notes, in which Samuel Walker was plaintiff and W. B. Magers was defendant, in the Circuit Court of the State of Oregon for Marion County, and also a notice endorsed on said complaint, of which the following is a copy:

"To W. B. Magers.

Take notice that unless you appear in the Circuit Court of the State of Oregon for the County of Marion, on the 3d Monday of September, A. D. 1861, and answer the annexed complaint, the same will be taken for confessed, and the prayer thereof will
43 be granted by the court.

(Signed) SMITH & GROVER, *Pltff's Attys.*"

Upon which notice is endorsed the following return, to wit:

"STATE OF OREGON, } *ss.*
MARION COUNTY. }

I certify that I have this, the 2nd day of September, 1861, served the within complaint and notice, by delivering to the wife of W. B. Magers, a white woman over 14 years of age, at the usual place of abode, a copy of the same, in Marion county, Oregon.

(Signed) GEO. A. EDES,
Sheriff Marion Co.,
By WM. BARKER, *Deputy.*"

Which said two promissory notes, and said complaint, with said notice and return thereon endorsed, were attached together and certified, as one transcript, to be true copies of the originals, by a certificate, of which the following is a true copy, to wit:

"In the Circuit Court for the County of Marion, State of Oregon.

STATE OF OREGON, } ss.
COUNTY OF MARION. }

I, Geo. A. Edes, clerk of said court, hereby certify that the foregoing transcript has been by me carefully compared with, and is a true copy and the whole thereof, of the original two promissory notes, complaint, notice to defendant, sheriff's return, and all the endorsements on all of said papers in the case wherein Samuel Walker was plaintiff, and W. B. Magers was defendant, as the same appears on file in my office and custody.

In witness whereof, I have hereunto set my hand and affixed the seal of said court, this 3 day of January, A, D. 1878.

[L. S.] GEO. A. EDES, *Clerk*,
By M. N. CHAPMAN, *Deputy*."

A true copy of which transcript, consisting of said two promissory notes, complaint, notice, return, and certificate is hereto attached, marked "Exhibit H," and made part of this bill of exceptions.

The defendant by his counsel objected to the said transcript, and to each and all of said writings composing the same, being read in evidence to the jury, upon the ground and for the reasons that said transcript and each of said writings composing said transcript, is incompetent and immaterial as evidence in this action, and because the recital in said judgment of due service upon the defendant in said action of Samuel Walker vs. W. B. Magers, introduced in evidence by defendant, could not be and is not conradicted or impeached by said return of the sheriff indorsed on said notice, constituting a part of said "Exhibit H," and because a copy of the entire judgment roll in said action is the best evidence on this subject, and should be produced, and not detached portions thereof, in any attempt to impeach or contradict said recital of due service contained on the face of said judgment; all of which objections were overruled by the court, and said transcript and each of the writings composing the same and constituting said "Exhibit H," was by the court allowed to be read, and was read in evidence to the jury; to which ruling of the court the defendant, by his counsel duly excepted at the time, and said exception was allowed by the court.

Plaintiff by his counsel then and next offered to read in evidence to the jury a duly certified transcript of the judgment hereinbefore mentioned in said action of Samuel Walker vs. W. B. Magers, a copy of which is hereto attached as "Exhibit D" aforesaid, which copy of the said judgment had a certificate

thereto attached, of which the certificate to Exhibit D is a duplicate in form.

Defendant by his counsel objected to the reading of said judgment to the jury as evidence in rebuttal by plaintiff on the ground and for the reasons that the same is incompetent and immaterial as evidence for any purpose of rebuttal, and upon the further ground that the judgment-roll in said action should be produced or a certified transcript thereof, and that plaintiff ought not to be permitted to give in evidence detached and fragmentary parts of the record in any effort to impeach the recital of due service contained in said judgment entry, or otherwise to impeach said judgment; which objections were overruled by the court, and the said judgment was allowed by the court to be read and was read in evidence to the jury, to which ruling of the court defendant by his counsel duly excepted at the time, and said exception was allowed by the court.

The evidence being all heard by the jury, counsel for
47 defendant moved the court to submit to the jury as a question of fact whether the entire judgment-roll in said said action of Samuel Walker vs. W. B. Magers had been produced in evidence by plaintiff; which motion was overruled and disallowed by the court, and counsel for defendant duly excepted thereto, and said exception was allowed by the court at the time.

The court then proceeded to declare the law to be that said judgment in said action of Samuel Walker vs. W. B. Magers was and is null and void for want of jurisdiction by the court which rendered it, over the person of said W. B. Magers, and the court directed the jury therefore to return a verdict in this cause in favor of the plaintiff herein, which was done; to which opinion, ruling, and action of the court defendant by his counsel duly excepted at the time, and said exception was allowed by the court.

And each and all of said exceptions so taken by defendant and allowed by the court are here now incorporated into and made part of this the defendant's bill of exceptions, which is approved by
his honor, the judge of this court, and is signed, allowed,
48 and enrolled and made part of the record and proceedings of this court in this cause. Done on this 26 day of February, A. D. 1878.

(Signed) MATTHEW P. DEADY,
U. S. District Judge, Oregon.

49 "*Exhibit A.*"

"THE UNITED STATES OF AMERICA."

To all to whom these presents shall come, greeting:

Whereas, there has been deposited in the general land office of the United States a certificate, numbered four thousand four hundred and one, of the register and receiver at Oregon City, Oregon, whereby it appears that under the provisions of the act of Congress, approved the 27th day of September, 1850, entitled "An act to cre-

ate the office of surveyor-general of the public lands in Oregon, and to provide for the survey, and to make donations to settlers, of the said public lands, and the legislation supplemental thereto, the claim of John B. Ducharme and his wife, Catharine Ducharme, of Marion county, Oregon, notification No. 877 has been established to a donation of one half-section, or three hundred and twenty acres of land, and that the same has been surveyed and designated as claim number sixty-four, being parts of sections seven and eighteen, in township five south, of range one west, and claim number eighty, being parts of sections twelve and thirteen, in township five south, of range two west, according to the official plat of survey returned to
50 the general land office of the surveyor-general, being bounded and described as follows, to wit: beginning at a point ten chains and twenty-seven links north of the southwest corner of section seven, in township five south, of range one west, and running thence north seventy-seven degrees west eleven chains and sixty-one links; thence south twenty-five chains and eighty-seven links; thence east eight chains; thence south twenty-eight chains and sixty-five links; thence east sixty-five chains; thence north twenty degrees and thirty minutes east thirty-seven chains and fifty-nine links, and thence north seventy-seven degrees west seventy-six chains and ninety-three links to the place of beginning, in the district of lands subject to sale at Oregon City, Oregon, containing three hundred and forty-one acres and sixty-eight hundredths of an acre.

Now, know ye, that the United States of America, in consideration of the premises, and in conformity with the provisions of the act aforesaid, have given and granted, and by these presents do give and grant, unto the said John B. Ducharme and to his heirs the south half, and unto his wife, the said Catharine Ducharme, and to her
51 heirs, the north half of the tract of land above described. To have and to hold the said tract, with the appurtenances, unto the said John B. Ducharme and his wife, Catharine Ducharme, and to their heirs and assigns forever, their respective portions as aforesaid.

In testimony whereof I, Ulysses S. Grant, President of the United States, have caused these letters to be made patent, and the seal of the general land office to be hereto affixed.

Given under my hand, at the city of Washington, this twenty-eighth day of April, in the year of our Lord one thousand eight hundred and seventy-five, and of the independence of the United States the ninety-ninth.

By the President: U. S. GRANT.

By L. D. WILLIAMSON, *Secretary.*

Recorded vol. 14, page 152. L. K. LIPPINCOT,

[SEAL.] *Recorder of the General Land Office.*

(On margin:) Copy of Ducharme patent.

Recorded in Marion county records, Book of Deeds, No. 18, page 545, on the 6th day of Jan., 1876.

52 "*Exhibit B.*"

This indenture witnesseth that we, Jean Baptist Durharme and Catharine, his wife, for the consideration of two thousand ($2,000), to us paid in hand, have bargained and sold, and by these presents do bargain, sell, and convey unto W. B. Magers, his heirs and assigns, the following described premises, to wit, as described in notification No. (877) eight hundred and seventy *seventy*-seven, claim (64) sixty-four, township 5 south, range 1 west, and claim (80) eighty, township 5 south, range 2 west, to have and to hold the said premises, with their appurtenances, unto the said W. B. Magers, his heirs and assigns forever. And I, the said Jean Baptist Ducharme and Catharine, his wife, do hereby covenant to and with the said W. B. Magers, his heirs and assigns, that I am the owner in fee simple of said premises, that they are free from all incumbrances, and that I will warrant and defend the same from all lawful claims whatever.

Witness our hands and seals, this 6th day of January, 1858.

[SEAL.] JEAN BAPTIST his × mark. DUCHARME.

[SEAL.] CATHARINE her × mark. DUCHARME.

Witnesses—GEORGE APLIN.
A. J. EDSON.

53 TERRITORY OF OREGON, } ss.
COUNTY OF MARION. }

On this 6th day of January, A. D. 1858, before the undersigned, a justice of the peace, came the above-named Jean Baptist Ducharme and Catharine Ducharme, his wife, who are known by me to be the identical persons described in and who executed the foregoing conveyance, and acknowledged that they executed the same.

And the said Catharine, his wife, on an examination separate and apart from her husband, acknowledged that she executed the same freely and without fear or compulsion from any one.

GEORGE APLIN, *Justice Peace.*

Recorded June 10th, 1858. E. J. HARDING, *Recorder.*

STATE OF OREGON, } ss.
COUNTY OF MARION. }

I, Geo. A. Edes, county clerk of said county, hereby certify that the foregoing transcript has been by me carefully compared with and is a true copy and the whole thereof of the original deed of conveyance from Jean B. Ducharme and his wife to W. B. Magers, as the same appears of record in Marion county records,

54

55 Book of Deeds No. 3, page 29, and recorded June 10, 1858, by E. J. Harding, recorder, now in my office and custody;
d I further certify that I am the legal custodian of said records.

In witness whereof, I have hereunto set my hand and affixed my official seal, this 3rd day of January, A. D. 1878.

[SEAL.] GEO. A. EDES, *Clerk.*

A true copy of the above exhibit.

(Signed) R. H. LAMSON, *Clerk.*

"*Exhibit C.*"

This indenture witnesseth that we, Wm. B. Magers and Mary Jane, his wife, for the consideration of the sum of five ($5.00) dollars to us paid, have bargained, sold, and quit-claimed, and by these presents do bargain, sell, and quit-claim unto W. J. Sullivan, the following described premises, to wit: A certain tract of land situated in the county of Marion, and State of Oregon, and in townships Nos. five (5) south, of range Nos. one and two (1 and 2) west, and beginning at a point 10.27 chains north of the southwest corner of section seven (7), township No. 5 south, range one west;
56 and running thence S. 77° E. 76.93 chains; thence S. 20½° W. on the east line of said claim No. 64, town. 5 south, range one west 19.59 chains (more or less) to the north line of the tract of land deeded by said W. B. Magers to Joseph Hibert; thence N. 87° W. on the said north line of said Hibert tract 71.24 chains to the west line of claim No. 80 of said townp. 5 south, range two (2) west; thence north 8.37 chains; thence west 8.00 chains; thence north 25.87 chains; thence S. 77° E. 11.61 chains to the place of beginning, and containing 214 acres, more or less, and being the north part of said land claims 80 and 64 in said townships and entered under the donation act as notification No. 877, by J. B. Ducharme and wife.

To have and to hold the said premises with their appurtenances, unto the said W. J. Sullivan, his heir and assigns forever.

In witness whereof, we have hereunto set our hands and seals, this fifteenth day of March, A. D. 1877 (seven.)

W. B. MAGERS. [SEAL.]
MARY J. MAGERS. [SEAL.]

In presence of—C. E. MAGERS.
J. P. MAGERS.

57 STATE OF OREGON, } *ss.*
COUNTY OF MARION. }

On the 15 day of March, A. D. 187–, before the undersigned, a notary public, came the above-named Wm. B. Magers and Mary Jane, his wife, who are known to me to be the identical persons described in and who executed the foregoing conveyance, and acknowledged that they executed the same; and the said Mary Jane, on examination separate and apart from her husband, acknowledged that she executed the same freely and without fear or compulsion from any one.

Witness my hand and seal, this 15th day of March, A. D. 1877.
[SEAL.] S. D. SNOWDEN, *Notary Public.*

Recorded March 16, 1877. GEO. A. EDES, *Recorder.*

STATE OF OREGON, } *ss.*
COUNTY OF MARION. }

I, Geo. A. Edes, county clerk of said county, do hereby certify that the foregoing transcript has been by me carefully compared with and is a true copy and the whole thereof of the original deed
58 of conveyance from Wm. B Magers and Mary J. Magers, his wife, to W. J. Sullivan, as the same appears of record in Marion county, in Book of Deeds No. 19, on page 197, and recorded March 16, 1877; and I further certify that I am the legal custodian of said records.

In witness whereof, I have hereunto set my hand and affixed my official seal, this 4th day of January, A. D. 1878.
[SEAL.] GEO. A. EDES, *Clerk.*

A true copy of exhibit. R. H. LAMSON, *Clerk.*

"*Exhibit D.*"

At a term of the Circuit Court of the State of Oregon for the County of Marion, began and held at the court-house in Salem in said county on the 16th day of September, A. D. 1861. Present, the Hon. R. P. Boise, judge; N. T. Caton, clerk; George A. Edes, sheriff. When, on the 17 day of September, 1861, or on the second judicial day of said term, present, the same judge and other
59 officers of the court as on the 16th day of Sept., 1861, among other the following proceedings were had, to wit:

SAMUEL WALKER, PLAINTIFF, }
vs.
W. B. MAGERS, DEFENDANT. }

This day came the said plaintiff, by Smith and Grover, his attorneys, and the said defendant, although duly served with process, came not but made default. It is, therefore, ordered and adjudged by the court that plaintiff have and recover judgment against said defendant for the sum of one hundred and eighty-eight dollars and 96 cents ($188.96), the amount found due upon two certain promissory notes upon which this suit is brought, with interest at the rate of two per cent. per month, together with costs of suit accruing to be paid, and that execution issue therefor.

(Signed) R. P. BOISE, *Judge.*

(Across the face:) Ex. issued Oct., 1861. For value received, I assign, transfer, and set over this judgment, this February 14, 1862, to George Settlemier.

SAMUEL WALKER,
By J. J. BASH.

In witness whereof, I have hereunto set my hand and affixed my official seal, this 3rd day of January, A. D. 1878.

[SEAL.] GEO. A. EDES, *Clerk.*

A true copy of the above exhibit.

(Signed) R. H. LAMSON, *Clerk.*

"*Exhibit C.*"

This indenture witnesseth that we, Wm. B. Magers and Mary Jane, his wife, for the consideration of the sum of five ($5.00) dollars to us paid, have bargained, sold, and quit-claimed, and by these presents do bargain, sell, and quit-claim unto W. J. Sullivan, the following described premises, to wit: A certain tract of land situated in the county of Marion, and State of Oregon, and in townships Nos. five (5) south, of range Nos. one and two (1 and 2) west, and beginning at a point 10.27 chains north of the southwest corner of section seven (7), township No. 5 south, range one west;
56 and running thence S. 77° E. 76.93 chains; thence S. 20½° W. on the east line of said claim No. 64, town. 5 south, range one west 19.59 chains (more or less) to the north line of the tract of land deeded by said W. B. Magers to Joseph Hibert; thence N. 87° W. on the said north line of said Hibert tract 71.24 chains to the west line of claim No. 80 of said townp. 5 south, range two (2) west; thence north 8.37 chains; thence west 8.00 chains; thence north 25.87 chains; thence S. 77° E. 11.61 chains to the place of beginning, and containing 214 acres, more or less, and being the north part of said land claims 80 and 64 in said townships and entered under the donation act as notification No. 877, by J. B. Ducharme and wife.

To have and to hold the said premises with their appurtenances, unto the said W. J. Sullivan, his heir and assigns forever.

In witness whereof, we have hereunto set our hands and seals, this fifteenth day of March, A. D. 1877 (seven.)

W. B. MAGERS. [SEAL.]
MARY J. MAGERS. [SEAL.]

In presence of—C. E. MAGERS.
J. P. MAGERS.

57 STATE OF OREGON, } *ss.*
COUNTY OF MARION. }

On the 15 day of March, A. D. 187–, before the undersigned, a notary public, came the above-named Wm. B. Magers and Mary Jane, his wife, who are known to me to be the identical persons described in and who executed the foregoing conveyance, and acknowledged that they executed the same; and the said Mary Jane, on examination separate and apart from her husband, acknowledged that she executed the same freely and without fear or compulsion from any one.

Witness my hand and seal, this 15th day of March, A. D. 1877.
[SEAL.] S. D. SNOWDEN, *Notary Public.*

Recorded March 16, 1877. GEO. A. EDES, *Recorder.*

STATE OF OREGON, } ss.
COUNTY OF MARION. }

I, Geo. A. Edes, county clerk of said county, do hereby certify that the foregoing transcript has been by me carefully compared with and is a true copy and the whole thereof of the original deed
58 of conveyance from Wm. B Magers and Mary J. Magers, his wife, to W. J. Sullivan, as the same appears of record in Marion county, in Book of Deeds No. 19, on page 197, and recorded March 16, 1877; and I further certify that I am the legal custodian of said records.

In witness whereof, I have hereunto set my hand and affixed my official seal, this 4th day of January, A. D. 1878.
[SEAL.] GEO. A. EDES, *Clerk.*

A true copy of exhibit. R. H. LAMSON, *Clerk.*

"Exhibit D."

At a term of the Circuit Court of the State of Oregon for the County of Marion, began and held at the court-house in Salem in said county on the 16th day of September, A. D. 1861. Present, the Hon. R. P. Boise, judge; N. T. Caton, clerk; George A. Edes, sheriff. When, on the 17 day of September, 1861, or on the second judicial day of said term, present, the same judge and other
59 officers of the court as on the 16th day of Sept., 1861, among other the following proceedings were had, to wit:

SAMUEL WALKER, PLAINTIFF, }
vs.
W. B. MAGERS, DEFENDANT. }

This day came the said plaintiff, by Smith and Grover, his attorneys, and the said defendant, although duly served with process, came not but made default. It is, therefore, ordered and adjudged by the court that plaintiff have and recover judgment against said defendant for the sum of one hundred and eighty-eight dollars and 96 cents ($188.96), the amount found due upon two certain promissory notes upon which this suit is brought, with interest at the rate of two per cent. per month, together with costs of suit accruing to be paid, and that execution issue therefor.

(Signed) R. P. BOISE, *Judge.*

(Across the face:) Ex. issued Oct., 1861. For value received, I assign, transfer, and set over this judgment, this February 14, 1862, to George Settlemier.

SAMUEL WALKER,
By J. J. BASH.

STATE OF OREGON, }
COUNTY OF MARION. }

I, Geo. A. Edes, clerk of said court, hereby certify that the
60 foregoing transcript has been by me carefully compared with and is a true copy and the whole thereof of the original judgment entry in the case of Samuel Walker, plaintiff, vs. W. B. Magers, defendant, as the same appears in the records of the Circuit Court of Marion County, State of Oregon, in book No. "3," on page 98, and the whole thereof, together with all the endorsements thereon; and I further certify that I am the legal custodian of said records.

In witness whereof, I have hereunto set my hand and affixed the seal of said court, this 26th day of Nov., A. D. 1877.

[SEAL.] GEO. A. EDES, *Clerk.*

A true copy of exhibit. R. H. LAMSON, *Clerk.*

"*Exhibit E.*"

Execution.

Circuit Court Marion County, State of Oregon.

To the sheriff of said county, in the name of the people of the State of Oregon.

Whereas Samuel Walker, at the Sept. term, 1861, of the
61 Circuit Court in and for said County of Marion, recovered judgment against W. B. Magers for the sum of 204 dollars and 41 cents, the judgment-roll whereof is filed in said county of Marion—

We hereby command you that out of the personal property of W. B. Magers, and if sufficient personal property cannot be found, then out of the real property belonging to him on the 17 day of Sept., 1861, or at any time thereafter, you cause to be made the sum of 204 dollars and 41 cents and interest, together with all legal accruing costs, and that you make due return of this writ.

Witness N. T. Caton, clerk of said court, his hand and the seal of said court, this 7 day of October, 1861.

[SEAL.] N. T. CATON, *Clerk.*

A true copy of exhibit. R. H. LAMSON, *Clerk.*

62 "*Exhibit F.*"

Whereas, at the September term of the Circuit Court of the State of Oregon for the County of Marion, A. D. 1861, Samuel Walker recovered judgment against W. B. Majers for the sum of two hundred and four dollars and forty-one cents, the judgment-roll whereof was duly filed in said county of Marion. And whereas, by virtue of an execution duly issued thereon, directed to the sheriff of said county, in favor of said Walker and against the said Majers,

the said sheriff exposed for sale, as the law directs, on the premises, to the highest bidder for cash, on Saturday, the 30th day of November, 1861, between the hours of 10 o'clock A. M. and 4 o'clock P. M. of said day, after giving due notice by publication for four weeks successively according to law, the following described real estate, to wit: notification No. 877, claim 64, in T. 5. S., R. 1 west, and claim No. 80, in T. 5 S., R. 2 W., in the county of Marion aforesaid, with the appurtenances thereunto belonging, to satisfy said execution and costs, Alexander A. Settlemier being the highest bidder, the said premises were declared sold to the said Settlemier for the sum of eight hundred and twenty-five dollars.

Now, therefore, know all men by these presents, that I,
63 George A. Edes, sheriff of the county of Marion aforesaid, in consideration of the premises and the sum of eight hundred and twenty-five dollars to me paid by the said Alexander A. Settlemier, the receipt whereof I do hereby acknowledge, have granted, bargained, and sold, and by these presents do grant, bargain, and sell unto the said Alexander A. Settlemier, his heirs and assigns, all those certain premises hereinbefore particularly described, with all the appurtenances, right, title, and interest of the said W. B. Majers in and to the same, "to have and to hold" the same, unto the said Alexander A. Settlemier, his heirs and assigns, forever.

In testimony whereof, I have hereunto set my hand and seal, this 25th day of March, A. D. 1862.

GEORGE A. EDES, [SEAL.]
Sheriff of the County of Marion, Oregon.

Signed and sealed in presence of—
L. F. GROVER.
M. MYERS.

STATE OF OREGON, } ss.
COUNTY OF MARION. }

Before me, county clerk of said county, personally came the above-named George A. Edes, sheriff of said county, known to me to be the identical person described in and who executed the
64 foregoing deed, and acknowledged that he, in his official capacity, executed the same.

Witness my hand and the seal of the county court of said county, this 25th day of March, A. D. 1862.

[SEAL.] N. T. CATON, *County Clerk.*

(Upon which deed is the following endorsement:)

STATE OF OREGON, } ss.
COUNTY OF MARION. }

In the circuit court of said county, at the March term thereof, the within deed was examined and approved by me in open court.

R. P. BOISE, *Judge.*

STATE OF OREGON, } ss.
MARION COUNTY. }

I certify that the within was received and duly recorded by me in Madison Co. records, book 23 of deeds, page 132, on the 21st day of Jany., 1878. GEORGE A. EDES, *Recorder.*

STATE OF OREGON, } ss.
COUNTY OF MARION. }

I certify the within duly recorded in Marion county rec-
65 ords, Book of Deeds No. 5, pages 591 and 592, March 25, 1862. N. T. CATON, *Recorder.*

"Exhibit G."

This indenture witnesseth that I, Alexander A. Settlemire, for and in consideration of the sum of five hundred (500) dollars to me in hand paid, have bargained and sold, and by these presents do bargain, sell, and convey unto Jesse H. Settlemire the following-described premises, to wit, as described in notification No. 877, eight hundred and seventy-seven, claim sixty-four, township five south, range one west, and claim (80) eighty, township five south, range two west, Willamette meridian, containing two hundred and fourteen acres, more or less. To have and to hold the said premises, with their appurtenances, unto the said Jesse H. Settlemire, his heirs and assigns forever. And I, the said Alexander A. Settlemire, do hereby covenant to and with the said Jesse H. Settlemire, his heirs and assigns, that I am the owner in fee simple of said premises; that they are free from all incumbrances, and
66 that I will warrant and defend the same from all lawful claims whatsoever.

Witness my hand and seal, this 26th day of Dec., A. D. 1864.
ALEXANDER A. SETTLEMIRE. [SEAL.]

Witness: BENJ. CLEAVER.
EMMA J. CLEAVER.

[U. S. rev. stamp, 50c.]

STATE OF OREGON, } ss.
MARION COUNTY. }

On the 26th day of December, A. D. 1864, before the undersigned, a justice of the peace, came the above-named Alexander A. Settlemire, who is known by me to be the identical person described in and who executed the foregoing conveyance, and acknowledged that he had executed the same freely and voluntarily for the purpose therein named. BENJ. CLEAVER,
Justice of the Peace.

Recorded May 22, 1868. GEO. A. EDES, *Recorder.*

STATE OF OREGON, } ss.
COUNTY OF MARION. }

I, George A. Edes, clerk of said Marion county, hereby
67 certify that the foregoing transcript has been by me care-

fully compared with and is a true copy and the whole thereof of the original deed, as the same appears of record in Marion county records, Book of Deeds No. 10, on page 123; and I further testify that I am the legal custodian; said deed being from A. A. Settlemire to J. H. Settlemire.

In witness whereof, I have hereunto set my hand and affixed my official seal, this 13th day of Oct., A. D. 1877.

[SEAL.] GEO. A. EDES, *Clerk.*
By M. N. CHAPMAN, *Dep.*

A true copy of exhibit. R. H. LAMSON, *Clerk.*

"*Exhibit H.*"

Ninety days after date I promise to pay Samuel Walker, or order, the sum of one hundred dollars, for value rec'd of him, at two per cent. interest per month from date till paid, this 7 day of July, 1860.

W. B. MAGERS.

A true copy of exhibit. R. H. LAMSON, *Clerk.*

Filed Sept. 17th, 1861. N. T. CATON, *Clerk.*

"*Exhibit H.*"

Ninety days after date I promise to pay Samuel Walker,
68 or order, the sum of fifty dollars, for value rec'd of him, at two per cent. interest per month from date till paid, this 17 day of September, 1860.

W. B. MAGERS.

Filed September 17, 1861. N. T. CATON, *Clerk.*

Exhibit H.

The Circuit Court of the State of Oregon for the County of Marion.

SAMUEL WALKER, PL'FF,
vs.
W. B. MAGERS, DEF'T. } Sept. term, 1861.

Plaintiff complains of defendant that he, said defendant, is indebted to said plaintiff in the sum of one hundred and eighty-eight dollars and $\frac{96}{100}$ on two certain promissory notes executed and delivered to plaintiff by defendant, at the several dates thereof; of which the following are true copies, to wit:

Ninety days after date I promise to pay Samuel Walker, or order, the sum of fifty dollars, for value received of him, at two per cent. interest per month from date till paid, this 17 day of Sept., 1860.

W. B. MAGERS.

69 Also—

Ninety days after date I promise to pay Samuel Walker, or order, the sum of one hundred dollars, for value received of him, at two per cent. interest per month from date till paid, this 7 day of July, 1860.

W. B. MAGERS.

And plaintiff states that there is now due to him from said defendant on said two promissory, notes over and above all legal set-offs, the said sum, one hundred eighty-eight dollars and ninety-six cents principal, and interest thereon, which he claims to have and recover, and demands judgment therefor with accruing interest and costs.

SAMUEL WALKER.

STATE OF OREGON, } ss.
COUNTY OF MARION. }

Samuel Walker, said plaintiff, being duly sworn, says that the foregoing complaint is true of his own knowledge, except as to matters and things therein set forth on information and belief, and as to these things he believes it to be true.

SAMUEL WALKER.

Subscribed and sworn to before me, this 30th August, 1861.
N. T. CATON.

70 To W. B. Magers:

Take notice, that unless you appear in the Circuit Court of the State of Oregon for the county of Marion, on the 3d Monday of September, A. D. 1861, and answer the annexed complaint, the same will be taken for confessed and the prayer thereof will be granted by the court.

SMITH & GROVER, *Plff's Attys.*

STATE OF OREGON, } ss.
MARION COUNTY. }

I certify that I have this the 2d day of September, 1861, served the within complaint and notice by delivering to the wife of Wm. B. Magers, a white woman over 14 years of age, at the usual place of abode, a copy of the same, in Marion county, O'g'n.

GEO. A. EDES,
Sheriff Marion County,
By WM. BARKER, *Deputy.*

For serving...	1 00
Mileage, 38...	3 80
Retn..... ..	25
	$5 05

Filed Sep. 3, 1861. N. T. CATON, *Clerk.*

70*a* "*Exhibit H.*"

In the Circuit Court for the County of Marion, State of Oregon.

STATE OF OREGON, } ss.
COUNTY OF MARION. }

I, Geo. A. Edes, clerk of said court, hereby certify that the foregoing transcript has been by me carefully compared with and is a true copy and the whole thereof of the original two promissory notes,

complaint, notice to defendant, sheriff's return, and all the endorsements on all of said papers, in the case wherein Samuel Walker was plff. and W. B. Magers was defendant, as the same appears on file in my office and custody.

In witness whereof, I have hereunto set my hand and affixed the seal of said court, this 3 day of January, A. D. 1878.

[SEAL.] GEO. A. EDES, *Clerk*,
By M. N. CHAPMAN, *Deputy*

A true copy of exhibit. R. H. LAMSON, *Clerk*.

(Endorsed:) In the Circuit Court of the United States for the District of Oregon. No. 354. W. J. Sullivan vs. J. H. Settlemier. Bill of exceptions and exhibits. Filed Feb. 27th, 1878. R. H. Lamson, clerk. D. B. D. & S., attys. for deft.

71 In the Circuit Court of the United States for the Ninth Judicial Circuit, District of Oregon.

WILLIAM J. SULLIVAN
vs.
JESSE H. SETTLEMIRE. } No. 354. Certificate.

I, R. H. Lamson, clerk of the Circuit Court of the United States for the District of Oregon, do hereby certify that the foregoing copies of the papers, pleadings, and orders of court in said cause have been by me compared with the original papers, pleadings, and journal entries of said orders in said cause, and that they are correct copies of such originals, constituting the judgment-roll, bill of exceptions, and exhibits thereto in said cause, and of the whole thereof, as the same appear of record and on file at my office and in my custody. And I further certify that the citation and writ of error hereto attached are the original citation and writ of error issued in said cause.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Portland, in said district, the August 19th, 1878.

[SEAL.] R. H. LAMSON,
Clerk U. S. Circuit Court for Oregon.

(Endorsed on cover:) Oregon C. C. U. S. No. 771. Jesse H. Settlemier, plaintiff in error, vs. William J. Sullivan. Filed 16th September, 1878.

IN THE SUPREME COURT

OF THE

UNITED STATES.

JESSE H. SETTLEMIER,

Plaintiff in Error,

Vs.

WILLIAM J. SULLIVAN,

Defendant in Error.

BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR.

J. N. DOLPH,
Attorney for Plaintiff in Error.

PORTLAND, OREGON:
A. G. WALLING, STEAM PRINTER AND BOOKBINDER.
1878.

IN THE SUPREME COURT

OF THE

UNITED STATES.

JESSE H. SETTLEMIER,

Plaintiff in Error,

Vs.

WILLIAM J. SULLIVAN,

Defendant in Error.

BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR.

I.

STATEMENT OF CASE.

This is an action of Ejectment brought in the Circuit Court of the United States for the District of Oregon by defendant in error, who alleges in his complaint that he is the owner in fee simple and entitled to the immediate possession of the premises therein described, as against plaintiff in error, who wrongfully withholds possession thereof from him to his damage in the sum of $3,000.00.

Record Folios, 1, 2, 3

Plaintiff in error by his answer admits himself to be in possession of a portion of the land in controversy, and denies that he is in possession of the remainder thereof. But he denies that such possession is wrongful, and alleges, that he (plaintiff in error) is the owner in fee simple of that portion of the land of which he admits himself to be in possession, and alleges that he has placed permanent and valuable improvements on that portion of the land held by him, of the value of $6,275 00, out of which he offers to set off an amount equal to the damage defendant in error may be ascertained to have sustained, if found to be the owner and entitled to the possession of said land.

Record Folios, 6 to 12, inclusive.

Defendant in error, by his reply, denies each and every of the affirmative allegations of said answer.

Record Folios, 13 to 15, inclusive, and 18.

A trial by jury was had upon the issues thus joined which, under the rulings and charge of the Court, resulted in a verdict and judgment in favor of defendant in error as to the ownership and right to the possession of the land, without damages.

Record Folios, 19 to 21, inclusive, and 25 to 29 inclusive.

From that judgment a writ of error is brought to this Court.

Record Folios, 33 and 34, inclusive.

Defendant in error to sustain his title to said land read in evidence to the jury a Patent from the U. S. to John B. Ducharme and Catherine Ducharme, his wife, for the land in controversy, bearing date April 28, 1875.

Record Folios, 49 to 51, inclusive.

A deed from Jean Baptiste Ducharme and Catherine Ducharme, his wife, to William B. Magers for the land in controversy, bearing date January 6, 1858.

Record Folios, 52 to 55, inclusive.

A deed from W. B. Magers and wife to W. J. Sullivan, defendant in error, for the land in controversy, bearing date March 15, 1877.

Record Folios, 56 to 57.

William Darst, a witness for defendant in error, testified that he was acquainted with the land in controversy, and that Jean Baptiste Ducharme was in possession of another portion of the same donation claim from 1850 to 1854, that a man named Edson claimed it in 1857, and that Magers occupied it from 1858 to 1862, when Settlemier went into possession of it.

Record Folios, 38 to 39, inclusive.

As shown by the Bill of Exceptions the foregoing was the whole of the evidence offered by defendant in error to establish his claim of ownership to the land in controversy.

Record Folios, 35 to 40, inclusive.

The introduction of the deed from Ducharme to Magers was objected to when offered, on the ground that the grantor therein did not appear to be the same person named as grantee in the Patent from the U. S., which objection was overruled by the Court and counsel for plaintiff in error excepted, Record Folio 36; but, as in the subsequent progress of the trial, plaintiff in error himself claimed title under Magers, that exception is abandoned.

Plaintiff in error to sustain his claim of title and right to possession of the land in controversy read, in evidence, a certified transcript of a judgment of the Circuit Court of the State of Oregon, for the County of Marion, rendered on the 17th day of September, A. D., 1861, in the case of *Samuel Walker vs. W. B. Magers* in favor of saidplaintiff and against the said defendant for the sum of $188 96.

Record Folio 59.

A certified transcript of the cost bill and of the judgment lien docket showing the debt and costs adjudged to amount to $204 41 were also read by plaintiff in error; but the record fails to show the fact.

A certified copy of the execution issued upon said judgment.

Record Folio 61.

A certified copy of a Sheriff's deed to Alexander A. Settlemier for the land in controversy, dated March 25, 1862, reciting the sale of said land upon said execution in

satisfaction of said judgment, and order of Court confirming said sale endorsed on said deed.

Record Folios, 62 to 64, inclusive.

A certified copy of a deed from A. A. Settlemier to plaintiff in error for the land in controversy, bearing date Dec. 26, 1864.

Record Folio, 65, 66.

Plaintiff in error having rested his evidence, defendant in error read in evidence in rebuttal a certified transcript of two promissory notes executed by W. B. Magers to Samuel Walker, a complaint filed September 3, 1861, in an action upon said notes in the action of *Samuel Walker vs. W. B. Magers* in the Circuit Court of the State of Oregon for Marion County, a notice endorsed on said Complaint, (which fulfilled the office of a summons under the law of Oregon then in force) and a return of the Sheriff of Marion County as to the manner in which he served said notice.

Record Folio, 67 to 71.

These papers were all attached together and certified as one transcript by certificate to be found in

Record Folio, 70.

Defendant in error then read in evidence to the jury a certified transcript of the same judgment, in the case of

Samuel Walker vs. W. B. Magers above stated to have been read in evidence by plaintiff in error.

Record Folio, 46.

Which judgment was certified separately from the last named transcript, and as being taken from the Court Journal. See the certificate.

Record Folio, 60 and 46.

Plaintiff in error objected to each item of said evidence in rebuttal, when and as the same was offered by defendant in error, for the reasons and upon the ground set forth in the following assignment of errors, but the objections were severally overruled and exceptions taken and allowed.

Record Folios, 42 to 47, inclusive.

II.

ASSIGNMENT OF ERRORS.

Plaintiff in error objected to the reading of said transcript of the notes, complaint, notice and return, upon the ground and for the reasons that said transcript, and each of said writings composing said transcript, is incompetent and immaterial as evidence in this action, and because *the recital* in said judgment *of due service* upon the defendant in said action of *Samuel Walker vs. W. B. Magers* introduced in evidence by plaintiff in error could not be, and is not, contradicted or impeached by said return of the Sheriff indorsed

on said notice constituting a part of said "Exhibit H;" and because a copy of the entire judgment roll in said action is the best evidence on this subject, and should be produced, and not detached portions thereof, in any attempt to impeach or contradict said recital of due service contained on the face of said judgment; all of which objections were overruled by the Court, and plaintiff in error duly excepted. *See Bill of Exceptions,*

Record Folio, 45.

FIRST. Plaintiff in error therefore assigns such ruling of the Court, and the admitting said transcript to be read in evidence to the jury, as one of the errors relied on in this Court.

Record Folio, 42 to 45.

The transcript of the judgment could only become material evidence for defendant in error, by way of rebuttal, in connection with and as dependent upon the worth and materiality of the transcript of the complaint, notice and return of service thereof aforesaid; and plaintiff in error by his counsel therefore objected to the introduction of the copy of judgment as evidence in rebuttal, because it was immaterial as evidence, and as to said transcript of judgment, that the entire judgment roll ought to be introduced as a whole, and not dissevered copies of such parts of the record as taken together might constitute a judgment roll, —for the reason that the judgment roll, if produced, might contain an alias summons, or notice, with sufficient return of service thereof. These objections were overruled by the Court, and defendant in error was allowed to read said

transcript of judgment to the jury in rebuttal, to which ruling plaintiff in error, by his attorneys, duly excepted at the time. *See Bill of Exceptions.*

Record Folio 46 and 61.

SECOND. This ruling of the Court is therefore assigned as one of the errors relied upon to reverse the judgment in this case.

The evidence having been heard and the cause argued by counsel for the parties respectively, Counsel for plaintiff in error requested the Court to submit to the jury as a question of fact, whether the entire judgment-roll in said action of *Samuel Walker vs. W. B. Magers* had been produced in evidence by defendant in error, which motion was overruled and plaintiff in error excepted. *See Bill of Exceptions.*

Record Folio 47.

THIRD. The refusal of the Court to submit said question as a question of fact to the jury is relied upon as error in this case.

"The Court then proceeded to declare the law to be, that said judgment in said action of *Samuel Walker vs. W. B. Magers* was and is null and void, for want of jurisdiction by the Court which rendered it over the person of said W. B. Magers, and the Court directed the jury, therefore, to return a verdict in this cause in favor of the plaintiff herein, which was done, to which opinion ruling and action of the Court defendant duly excepted." *See Bill of Exceptions.*

Record Folio 47.

FOURTH. This opinion, ruling and action of the Court is likewise relied on as error in this cause.

III.

ARGUMENT.

I submit that the Court below committed error in allowing the transcript marked "Exhibit H," and the writings composing the same to be read to the jury.

The law of Oregon in force when said proceedings were had provided for the making and preservation of a judgment-roll. The statute referred to reads as follows:

"Immediately after entering the judgment the clerk shall attach together and file the following papers, which shall constitute the judgment-roll:

1. In case the complaint be not answered by any defendant, the summons and complaint or copies thereof with the proof of service, and memorandum endorsed on the complaint, that the default of the defendant in not answering was entered, and a copy of the judgment." Statutes of Oregon, 1855, Sec. 61, p. 119.

By statutes of Oregon in force at present and also when this action was tried in the Court below, it is provided that the following disputable presumptions shall obtain as matter of evidence.

Code Page 261. Sec. 766.

Subdivision 15. "That official duty has been regularly performed."

been tainted with irregularity were made and proved. The Court said: "We do not perceive how it can be said, consistently, with the great array of authorities bearing upon this subject, that the judgment was void as to Rumfelt. It will be observed that nothing is here to show that the several fragments exhibited in evidence constituted the whole record of the Union Bank case. For aught that appears, there may have been one or a dozen alias writs or counterparts sent to other counties, and by their means service obtained upon Rumfelt. The judgment solemnly declares that he was "duly served with process," and this record imports absolute verity. * * * It will be time enough to assume that the judgment is negatively falsified by the rest of the record, when it shall be made to appear that the entire record is before us." See also

Bernecker vs. Miller, 44 Mo. 102.

In the case of *Miller vs. Handy*, 40 Ill. 448, which was an action of ejectment, the judgment offered in evidence recited the default of defendant, "and it appearing to the Court that two writs of *scire facias* have been issued herein and *nihil* returned thereon it is therefore considered by the Court, that plaintiffs have judgment, etc." But one such return remained among the files. The Court said: "The Court finds, that two writs of *sci fa* had been returned *nihil*. This is strong presumptive evidence of that fact, to be rebutted only by the clearest proof. * * * A summons, in all cases, when returned into Court, is placed among the papers on file in the cases. It is a loose paper, easily lost and easily abstracted, and if the rule was that it must be produced in all time to come when a contest arises, the strongest inducement would be presented to

the interested and designing, to abstract such a paper, whereby, notwithstanding, the Court has found by its decree or judgment, that such a paper did exist; a title resting upon it would fail to the ground. This is neither justice nor common sense." See also

Clark vs. Thompson, 47 Ill. 27.

Reddick vs. State Bank, Ill. 27 Ill. 146.

But, *Secondly:* Will a judgment by default rendered by a Court of superior jurisdiction, be held to be void when introduced in evidence because an insufficient service appears from the return endorsed on the only summons remaining among the files in the case, when at the same time the judgment entry recites upon its face, that it appeared to the Court by which it was rendered that the defendant was "duly served with process."

That such a judgment cannot thus be impeached collaterally, I understand to be well settled law in this honorable Court, and also in the Courts of most of the states of this Union.

Some of the Courts base their conclusions upon the proposition that it will be presumed in favor of such judgment, that another and sufficient showing of service was before the Court rendering the judgment, which evidence has since been lost from the files; while others of the Courts hold that the question of jurisdiction is in such case as much *res judicata* as any other matter contained in the judgment, and if erroneous, must be corrected on appeal, otherwise it is binding, being not void, but voidable only.

"In case of an attempted service of process the presumption exists that the Court considered and determined the question whether the acts done were sufficient or insufficient. If so, the conclusion reached by the Court being derived from hearing and deliberating upon a matter which, by law, it was authorized to hear and decide, though erroneous cannot be void." Freeman, on Judgments, Sec. 126.

"It may happen, when that part of the record containing the evidence of service shows an insufficient service that other parts of the record, and especially the judgment, disclose the fact that the matter of jurisdiction has been considered and determined by the Court. The conclusion or finding upon this subject may appear by recitals stating that the defendant has been cited to appear, or that he has entered his appearance, or that his default for not appearing has been duly entered. These findings are as conclusive upon the parties, in all collateral proceedings as any adjudication of the Court can be. It must be presumed that they were supported by sufficient testimony, not set forth in the record. Thus, though the return upon a summons against A. B. certifies a service of such summons upon C. D., and the judgment states that A. B. has been summoned, the record is not necessarily contradictory. The error in the service of process may have been corrected by service of the summons on the proper person. And, since the statement to this effect is made by the Court, it will be conclusively presumed that it acted upon ample evidence and with due deliberation before making such statement; and the judgment will be impregnable to any collateral assault." Freeman, on Judgments, Sec. 130.

This honorable Court, it is true, has made an excep-

tion to this general rule, in cases where it appears affirmatively from the record, that at the commencement of the suit or action, the defendant was beyond the jurisdiction of the Court, so that the only kind of service possible was the substituted and statutory method by publication of summons. But in those very cases where this exception is established or recognized, the prevalence of the general rule above asserted is distinctly admitted.

Galpin vs. Page, 18 Wall, 368, 373.

So in *Gray vs. Larrimore*, 2, Abbott Rep. page 549, Mr. Justice Field, in delivering the opinion of the Court, said: "The general presumption indulged in support of the judgments and decrees of the superior Courts is, however, limited to jurisdiction over persons within their territorial limits—persons who can be reached by their process—and also over proceedings which are in accordance with the course of the common law. Wherever it appears, either from inspection of the record, or by evidence outside the record, that the defendants were, at the time of the alleged service upon them, beyond the reach of the process of the Court the presumption *ceases*, and the burden of establishing the jurisdiction over them is thrown upon the party who invokes the benefit or protection of its judgments and decrees."

Sargeant vs. State Bank of Indiana. 12 How, 384, 385.

Voorhees vs. Bank United States, 10, Peters 474.

Landis vs. Brant, 10, How, 371.

In *Quivey vs. Porter*, 37, Cal. 463, the Court say: "We said[1]: (in *Hahn vs. Kelly*, 34, Cal. 391) Suppose that part of the judgment-roll, denominated the proof of service, shows that service was made upon the son of defendant, and the remainder of the roll says nothing about service. We then have a want of jurisdiction appearing upon the face of the record. But suppose the judgment states that the defendant appeared, or that personal service was made upon him, or something else which is equivalent, as it frequently does, the opposite result follows, for the record cannot lie, and it appears that the father as well as the son has been served, which may well have been the case. The record, in such case, does not blow hot and cold, as might be supposed; on the contrary, both acts may have been done. On presentation of the return of service upon the son, the Court may have declared it no service, and service upon the father may have been subsequently made, and the wrong return may have found its way into the judgment-roll. To hold thus would be consistent with the record, while to hold otherwise would be to contradict the judgment.

"Apply the foregoing language to the record in *Peter Quivey vs. Joseph S. Ruckle*. The proof of service, or the return of the Sheriff, shows that the summons was served on *George* S. Ruckle. This was no service on *Joseph* S. Ruckle; and were the remainder of the record silent upon that question, there would be a want of jurisdiction apparent upon the face of the record under the rule in *Hahn vs. Kelly*. But the remainder of the record is not silent. The judgment shows that service was made upon Joseph S. Ruckle, and this statement of the Court is not contradicted or overcome by the statement of the Sheriff; on the con-

trary, both may be true, and in view of the fundamental rule, that the record of a Court of superior jurisdiction imparts absolute verity, we are bound so to regard them."

The language of the judgment is as follows: "In this case comes the plaintiff, by his attorney, and the defendant still failing to appear and answer the action, and it appearing to the satisfaction of the Court * * * that he has been duly served with process, etc."

In *Quivey vs. Baker*, 37 Cal., 465, the same Court held that, "A judgment by default is valid if it contains a recital that the defendant w.s personally served with process, although the certificate of service of summons found in the judgment-roll fails to show that the service was sufficient."

The statute of Oregon, in force when service of summons was made in the action of *Walker vs. Magers*, reads as follows: "The summons shall be served by delivering a copy thereof, together with a copy of the complaint prepared by the plaintiff, his agent or attorney, as follows: * * * In all other cases to the defendant or, if he be not found, to some white person of the family, above the age of fourteen years, at the dwelling-house or usual place of abode of the defendant."

Statutes of Oregon, 1855, p. 86. See 29.

The return of the sheriff is as follows:

"STATE OF OREGON, } ss
MARION COUNTY. }

I certify that I have this, the 2d day of September, 1861, served the within complaint

and notice, by delivering to the wife of Wm. B. Magers, a white woman over 14 years of age, at the usual place of abode, a copy of the same, in Marion County, Oregon.

GEO. A. EDES, Sheriff of Marion County,
By Wm. Barker, Deputy.

Record Folio, 70.

In *Isaacs vs. Price*, 2, Dillon, 347, the statute provided that "The service shall be made by delivering a copy of the summons to the defendant personally, or, by leaving one at his usual place of residence," and that "there shall be endorsed on the writ the amount for which judgment will be taken."

In the case then under consideration no such endorsement was made, and a judgment by default was rendered. The Court said: "A distinction is to be made between a case where there is *no* service whatever, and one which is simply *defective or irregular*. In the first case the Court acquires no jnrisdiction, and its judgment is void; in the other case, if the Court to which the process is returnable adjudges the service to be sufficient and renders judgment therein, such judgment is not void, but only subject to be set aside by the Court which gave it, upon seasonable and proper application, or reversed on appeal." The judgment recited that the defendant had been duly served. See also

Blasdel vs. Kean, 8, Nevada, 308.

Ely vs. Tallman, 6, Wis., 258, 259.

Cullen vs. Ellison, 13, Ohio, St., 452.

In *Bonsall vs. Isett*, 14 Iowa, 309 the very point upon which this case at bar was made to turn in the Court below was decided. In that case the Court said: "The question, however, which seems to have attracted the largest share of the attention of counsel for the appellants is a legal one, going to the jurisdiction of the Court over the person of Bonsall, at the time the judgment of foreclosure was rendered. The return of the officer reads as follows: "This notice came to hand January 21, 1858. I served the same upon Geo. W. Bonsall, by leaving a copy thereof at his usual place of residence with Leah Bonsall, a member of his family, over the age of fourteen years. We have several times held in a direct proceeding between the parties on an appeal, that such a service was defective in failing to state in the return that the party intended to be served in that method was 'not found.' With these words in the return, in this case, the service would have been complete. Without them it was technically incomplete. The question of its sufficiency was directly passed upon by the Court. The language of its judgment is, 'and it appearing that the defendants had been each duly served with notice of the pendency of this suit, and being each three times solemnly called, came not, but made default,' etc.

It was the province of the Court thus to determine its own jurisdiction over the person of the defendants. If in so doing it errs, the method of correcting the error is by an appeal; it cannot be passed upon and determined in a collateral proceeding." See also

Thorp vs. Brenneman, 41, Iowa, 251.

Wetherill vs. Stillman, 65, Pa. St., 114.

The cases of *Heatherly vs. Hadley* and *Tustin vs. Gaunt*, decided by the Supreme Court of Oregon, were much relied on by counsel for defendant in error in the Court below as favoring their position.

The case of *Heatherly vs. Hadley*, 4, Oregon, 2, was a suit to set aside a decree of foreclosure on the ground of jurisdiction in the Court which rendered it. The defendant in his answer, alleged that plaintiff was duly served in that suit as will more fully appear by the following return endorsed upon the summons.

"I hereby certify that I have this 14th day of October, 1863, served the above summons by leaving a certified copy thereof, together with a copy of the affidavit and complaint prepared by plaintiffs attorneys, in the hands of Mary J. Heatherly, wife of the defendant, James Heatherly, (she being a white person over 14 years of age), at his usual place of abode, in Lane County, Oregon.

T. J. BRATTAIN,
Sheriff."

And the Supreme Court simply held that defendant himself having alleged that to be the evidence of service upon which the decree under which he claimed was based, there was no room left for presumption of other service, and that shown being insufficient, the Court was without jurisdiction.

Tustin vs. Gaunt, 4, Oregon, 305, was an action of ejectment. Respondent, to prove title in himself, offered in evidence an order of sale of the land by the County Court. Appellant objected to it for want of jurisdiction in the Court over either the person or subject matter.

There was no showing as to how service or notice was claimed to have been given. The Court said, "The order of sale contains the further recital that this 'petition came on for final hearing, and, it appearing to the Court that due notice of this hearing had been given to those interested in said estate, * * * and it further appearing necessary for the payment of the debts of the deceased, that said real estate should be sold, it was therefore ordered,' etc. Thus it seems that it not only appears upon the face of the record that the Court had jurisdiction of the subject matter, but of the parties in interest."

In *Ladd vs. Higley*, 5, Oregon, 207, plaintiff, in 1874, filed a motion under the statute for leave to issue an execution on a judgment obtained in 1862, the law providing that after the lapse of five years without issuing an execution the writ cannot be then issued without such leave of Court. The defendant resisted the application on the ground, among other things, that the proof of service of the notice on which the judgment of 1862 was obtained, was not sufficient to give the Court jurisdiction of the person of Higley. The Court said, "Again, there is a recital in the judgment entry in the judgment of 1862, to the effect that Higley had been duly served in Yamhill County, Oregon, with the complaint and notice in that case, more than ten days before the term of Court at which the judgment was rendered, *and nothing short of a clear contradiction in the roll will affect this recital.*"

I therefore respectfully submit that, although the sheriff's return in *Walker vs. Magers* may be thought not sufficient to sustain the recital in the judgment entry, that due service was had, yet it does not *contradict* that recital. There may have been, and for aught that appears,

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there was an alias summons with a full showing of service, and upon collateral attack, as in this case, it will be presumed that this was the case; besides that, even if such presumption did not prevail, the decision of the Court, that such service as was had was sufficient, if erroneous, rendered the judgment irregular only, and not void ; and that therefore the opinion and ruling of the Court below, and its charge to the jury, that said judgment was void, is erroneous, and the judgment of the Court below should be reversed.

J. N. DOLPH.
Att'y for Pl'ff. in Error.

IN THE SUPREME COURT

OF THE

UNITED STATES.

JESSE H. SETTLEMIER,

Plaintiff in Error,

Vs.

WILLIAM J. SULLIVAN,

Defendant in Error.

REPLY BRIEF OF PLAINTIFF IN ERROR.

J. N. DOLPH,
Attorney for Plaintiff in Error.

PORTLAND, OREGON:
A. G. WALLING, STEAM PRINTER AND BOOKBINDER.
1878.

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Defendant in Error.

REPLY BRIEF OF PLAINTIFF IN ERROR.

Counsel for Defendant in error attempts, on pages 9 to 13 of his brief, to show that the Statute of 1855 referred to on page 9, of the principal brief of Plaintiff in error had been repealed, so that at the time of the rendition of the judgment in Walker vs. Magers on Sept. 17, 1861, there was no law in Oregon requiring a judgment-roll to be made up or preserved.

Near the foot of page 10 of the brief of Defendant in error, it is said :

"This by implication repeals the section of the Statute of 1855, referred to by Counsel for Plaintiff in error."

He then proceeds to show that subsequently this act of Dec. 10, 1856, which, it is claimed, thus repealed the law as it stood in 1855, was itself repealed by Act of Jan. 17, 1859, by the first section of which latter act, all acts and parts of acts repealed by said act of Dec. 10, 1856, and not otherwise repealed, "are hereby revived except as hereinafter specified."

It is not claimed that the law of 1855, requiring a judgment-roll to be made up, was not thereby revived, unless by force of Sec. 10, which provides that

"All acts and parts of acts, fixing the terms of the Supreme and District Courts, or otherwise *contravening* the provisions of this act, are hereby repealed."

As the act of Jan. 17, 1859, makes no provision whatever relating to judgment-rolls, except to revive the law of 1855, it cannot be claimed successfully that the law of 1855 *contravened* any of the provisions of said act of January 17, 1859.

But, on page 12 of his brief, Counsel, for the Defendant in error, claims that Section 10 of the act of June 4, 1859, expressly repealed both said acts of Jan. 17, 1859, and Dec. 10, 1856, and said Section 10 he purports to copy, being careful, however, to omit a portion thereof, which is destructive of his whole argument on this question. The entire section reads as follows :

"Sec. 10. The act of the Legislative Assembly, passed January 17, 1859, entitled 'An Act to change the practice, and fix the time for holding the Courts,' and the act of the 10th of December, 1856, hereinbefore referred to, and all other acts and parts of acts, *so far as they conflict with this*

act, are hereby repealed. *Provided*, That in all cases where terms of Courts were not held as provided in said act of January 17, 1859, in consequence of the admission of the State of Oregon, all process issued and made returnable to said terms of Court shall not be affected by the failure to hold such terms."

As said act of June 4, 1859, makes no provision whatever upon, or even mention of, the subject of judgment-rolls, so much of the act of January 17, 1859, as revived the law of 1855, on that subject, is, therefore, not in conflict with said act of June 4, 1859; and the law of 1855 was, consequently, in full force on Sept. 17, 1861.

SECOND.

The position of Counsel, for Plaintiff in error, is not that a recital of due service in a judgment-entry cannot, in any case, be contradicted, but is, that the recital in the judgment-entry in Walker vs. Magers "could not be, and is not contradicted" by the return of the Sheriff, on the summons in that case. That return may fail to *establish*, but it does not *contradict* that recital. Of course, if the journal entry had recited that it appeared to the Court by this particular return (so designating it by date and description as to preclude all room for presumption that there was any other), that the Defendant had been duly served; then the remarks of Counsel, for Defendant in error, upon this branch of the case, might find support, which is now lacking in the facts of the case.

The Court will also observe that the Statute of June 4, 1859, Sec. 5., provides that

"Writs of summons are abolished, and instead thereof, a

notice, signed by the complaint, his attorney, or solicitor, shall be endorsed upon, *or appended to* the complaint, and served as a summons, &c."

The Statute did not direct that the return of the Sheriff should be either endorsed upon, or appended to the complaint, or even upon the notice ; and it is not an extravagant presumption to suppose that the Sheriff did make and file an amended return showing due service. I apprehend, furthermore, that whether such return was attached to the complaint or notice, or not, would not invalidate the judgment, especially when attacked collaterally ; and, as the Court, which rendered that judgment, declared that at that time the evidence of sufficient service was before it, and as that recital is not contradicted by the return now found among the papers, I submit that this Court should and will presume, in favor of the judgment, that the Defendant therein was duly served.

Nor do I find any case cited by adversary Counsel, which militates in the least against this position.

In the case of Harris vs. Hardman, 14 How. 334, there was a motion made and sustained to quash a *fieri facias* issued, for enforcement of the judgment, out of the same Court by which it was rendered, and, therefore, in the course of that very proceeding. The Court, still having control of its own judgment, sustained the motion, because the only service of summons claimed did not authorize the rendition of the judgment. It is said, in the opinion of this Court in that case on page 345, "At the time of the motion to the Circuit Court to quash the forthcoming bond, and to set aside the judgment by default, that judgment was still unsatisfied, and was in progress of execution,

and the forthcoming bond filed in the Clerk's office, according to the laws of the State, was properly a part of the process of execution, the *fieri facias* being sued out therein from the office without any order of the Court. The proceedings then, still being as it were *in fieri*, and not terminated, it was competent for the Court to rectify any irregularity which might have occurred in the progress of the cause, and to do this either by writ of error *coram vobis*, or by *audita querela*, if the party choose to resort to the latter mode." A very different case, from a collateral attack upon the judgment of a Court of superior jurisdiction, made in another forum.

In Knowles vs. Gaslight and Coke Company 19 Wall. 59, this Court held "that the Defendant had a right to *show by proof* that he had never been served with process, and that the Circuit Court of Cass county never acquired jurisdiction of his person. As this was refused him on the ground that the evidence was inadmissible, the judgment must be reversed. When the Defendant resides in the State in which the proceeedings are had, service at his residenee, and perhaps other modes of constructive service, may be authorized by the laws of the State. But in case of *non-residents*, like that, under consideration, personal service cannot be dispensed with, unless the Defendant voluntarily appears."

There is some difference between the question whether in such a case the Defendant *may show*, by proof, that he had never been served; and the question in the case at bar, which is whether the proof relied on to show that Magers, a resident of Marion county, Oregon, was not served, is *sufficient* for that purpose.

Counsel, for Defendant in error, suggests that it does not appear that the copy of summons and complaint was left at Magers' place of residence: That he and his wife may not have lived together at the time. But the presumption of law is, that the residence of the husband is that of his wife, until the contrary affirmatively appears.—[2 Bishop on Marriage and Divorce, Secs. 124, 125.

The case of Earle vs. McVeigh, 1 Otto 503, is the decision of this Court, *on appeal* from the judgment of the Circuit Court of the United States for the Eastern District of Virginia, that the judgment appealed from was invalid, because service was made by posting notice on a house seven months, after it had been vacated by the Defendant, it being held that said house was not, at the time, his "usual place of abode." That case, therefore, is inapplicable to the case at bar.

The case of Neff vs. Pennoyer, 5 Otto 714, was service by publication against a non-resident, and is equally inapplicable in fact and principle to this case.

Hoffman vs. Hoffman, 46 N. Y. 30, decides that a decree of divorce obtained in another State, the Defendant not being served with process, and both parties, at the commencement of the suit, and, during its pendency, being residents of New York, is invalid.

In Rape vs. Heaton, 9 Wis. 301, so far from there being a recital on the face of the judgment that the Defendant had been duly served with process, it is said by the Court,

"We have also great doubt whether the record here presented should be sustained as the record of a judgment. It shows the issuing of the writ, the return; and then there is

a docket entry that 'the Court grant judgment'. This was, doubtless, the point where interlocutory judgment on default should have been entered, but what the judgment was does not appear. There are, then, the proceedings of the Sheriff's jury in assessing damages, which resulted in a finding that the Plaintiff sustained damages, stating the amount, followed by a docket entry that 'the Court grant judgment on the finding of the inquest.' But what is the judgment? Was it against one or both of the Defendants? This the record does not show. It consists only of the docket entries, showing that judgment was probably ordered by the Court, but not showing any record of the judgment itself." The action was in the State of Wisconsin o . this so-called judgment record from the Court of Common Pleas, Mercer county, State of Pennsylvania, and, upon the summons, was indorsed this return

"I have served this writ on Defendant Peter Rape and William Rape, by leaving a certified copy with *his* family in their residence on the 15th of April."

The case of People vs. Dowell, 25 Mich. 247, is not accessible to Counsel, for Plaintiff in error.

The case of Trullinger vs. Todd, 5 Oregon 37, was an appeal from a judgment by default entered by the Clerk in vacation, under the provision of a Statute of Oregon. The action of the Clerk, being merely ministerial and not judicial in such case, of course, if the only service appearing in the record was insufficient to entitle the Clerk to act, the judgment was, therefore, void. In fact, the Supreme Court, in its decision, intimates a doubt as to the constitutionality of the Statute itself.

Freeman on Judgments, Secs. 129 533, 535.

The judgment of the Circuit Court of the State of Oregon for Marion county, in the case of Walker vs. Magers, when offered in evidence in the Courts of the United States, is not to be regarded as the judgment of either an inferior or a foreign Court. This honorable Court has repeatedly held that in such case the same faith and credit will be given the judgment to which it would be entitled, under like circumstances, in the Courts of another State.

"Courts of record are presumed to act only in accordance with the authority vested in them by law. Their judgments will generally be treated as conclusive on the parties until the absence of jurisdiction is *affirmatively shown*. These principles are almost universally recognized in regard to domestic judgments. They are, by a preponderanee of the authorities, considered as applicable with equal force to judgments of other States."

Freeman on Judgments, Sec. 565, and cases cited.

The doctrine that in such cases the question of jurisdiction may be *enquired into*, when, under similar circumstances, such enquiry might not be permitted in a domestic forum, does not destroy the *prima facie* presumption in favor of the validity of the judgment ; nor alter the rules of evidence as to the sufficiency of the proof offered to overthrow that presumption.

When the Defendant is not shown to have been non-resident, and, therefore, beyond the reach of the ordinary process of the Court, a recital in the judgment entry that he was duly served will be accepted in the first instance as speaking the truth; and where, as in the case of Walker vs. Magers, it appears, from the return of the Sheriff, that the Defendant was then a resident of the State and county

where the judgment was rendered, and the judgment recites that he was duly served, *without stating the particular evidence of such service*, I respectfully submit that such recital *cannot be* contradicted by other portions of the record even, when such judgment is offered in evidence collaterally in a Court of the United States, or of another State.

Galpin vs. Page, 18 Wall. 366, 367.

And, were this not true, it is furthermore submitted that the recital contained in the judgment now under consideration *is not* contradicted by the return of the Sheriff relied on for that purpose. There may have been, there probably was, and the Court which rendered said judgment, declared that there *actually was* sufficient service of notice (without stating the evidence thereof), had upon Magers, as required by law, before the judgment was rendered; and that finding and adjudication is, as I understand the authorities, absolutely conclusive of that question in every other Court where the judgment is assailed collaterally. The fact that one or more returns of the Sheriff remaining on file may not support that finding, cannot invalidate the judgment.

J. N. DOLPH,
Attorney for Plaintiff in Error.

IN THE

IN THE

Supreme Court of United States.

JESSE H. SETTLEMIER,
Plaintiff in Error.

VS.

WILLIAM J. SULLIVAN,
Defendant in Error.

Brief and Argument of Defendant in Error.

STATEMENT OF PLEADINGS.

Action of ejectment brought by defendant in error to recover the possession of certain lands in Marion county, Oregon. Complaint alleges that plaintiff, (defendant in error), is owner in fee simple and entitled to possession of the demanded premises.

Record, folios 1, 2, 3.

The defendant (plaintiff in error) answers, disclaiming as to a part of the demanded premises; and denying the title and right of possession of plaintiff (defendant in error), and averring

title and right of possession in himself as to the rest of the premises.

Record, folios 6, 7, 8, 9, 10, 11.

The plaintiff (defendant in error) replies, denying the title and right of possession averred by defendant (plaintiff in error.)

Record, folio 18.

That part of the demanded premises which defendant, (plaintiff in error) disclaims is no longer in the case.

There was a claim for damages for unlawful detention of the demanded premises; and a counter claim for permanent improvements made on the premises by defendant (plaintiff in error); but there is in this court no question arising out of those matters.

STATEMENT OF THE TRIAL.

The case was tried by a jury, and a verdict was rendered for plaintiff (defendant in error.)

Record, folios 19, 20, 21.

After a motion for new trial had been made and submitted (Record, folios 22, 23), and that motion denied by the court, (Record, folio 24), judgment was given for plaintiff (defendant in error) on the verdict, for the possession of that part of the demanded premises for which defendant (plaintiff in error) defended.

Record, folios 25, 26, 27, 28, 29.

The case comes to this Court upon writ of error.

Record, folios 33, 34.

At the trial in the court below, the plaintiff (defendant in error) to sustain his title, read in evidence :

1st.—Patent issued by the United States to John B. Ducharme and Catharine, his wife, for a tract of land embracing the premises in controversy, under the act of Congress of Sept. 27, 1850, making donations to settlers in Oregon, which is commonly called the Oregon Donation Law.

Record, folios 49, 50, 51.

2d.—A deed from Ducharme and wife to Wm. B. Magers, for a tract of land embracing the premises in controversy.

Record, folios 52, 53, 54, 55.

3d.—A deed from William B. Magers and wife to W. J. Sullivan, the defendant in error, for a tract of land including the premises in dispute.

Record, folios 56, 57.

4th.—William Darst, a witness for defendant in error, testified that he had lived in Marion county, Oregon, since 1847, that he knew the lands now occupied by defendant (plaintiff in error), that he knew Ducharme occupied the same premises in 1850.

The witness traced the possession of the premises in controversy, from Ducharme, the Donation claimant, through Magers, to defendant (plaintiff in error) Settlemier.

Record, folios 38, 39, 40.

The defendant (plaintiff in error) to sustain his claim of title and right to the possession of the premises in controversy, read in evidence:

1st.—A certified transcript of a judgment of the Circuit Court of the State of Oregon, for the County of Marion, rendered on September 17th, 1861, in the case of *Samuel Walker* vs. *W. B. Magers*, in favor of plaintiff, and against the defendant, for $188.96.

Record, folio 59.

2d.—A certified copy of an execution claimed to have been issued upon said judgment.

Record, folio 61.

3d.—A certified copy of sheriff's deed to Alexander A. Settlemier for the lands in controversy, dated 25th March, 1862, purporting to have been made pursuant to a sale thereof, upon said execution.

Record Folios, 62, 63.

4th.—A certified copy of a deed from A. A. Settlemier to defendant, (plaintiff in error) for the land in controversy, of date 26th December, 1864,

Record, folios 65, 66.

The defendant (plaintiff in error) here rested his case.

The plaintiff (defendant in error), in rebuttal, read in evidence a certified transcript of two promissory notes made by W. B. Magers to one Samuel Walker, the complaint, filed September 3, 1861, declaring upon said notes in the action of

Samuel Walker vs. *W. B. Magers*, in the Circuit Court of the State of Oregon, for Marion county, the notice endorsed on said complaint, (which notice, under the law of Oregon then in force, fulfilled the office of a summons) and the return of the sheriff of Marion county showing the manner in which he served the said notice, together with a certified transcript of the judgment rendered therein, being the same judgment in the case of *Samuel Walker* vs. *W. B. Magers*, before referred to as having been introduced by defendant, (plaintiff in error), a copy of which is set forth in the Record, (folio 59), and referred to in the Record, (folio 46), and thereupon rested his case.

These several papers, except the judgment, were attached together and certified as one transcript.

ARGUMENT.

Upon the trial below, plaintiff in error excepted to the admission in evidence of the deed from J. B. Ducharme and wife to W. B. Magers, marked "Exhibit B," (Record, folio 52) upon two grounds: 1—That said deed does not appear to have been executed by the same persons named as donees in the U. S. patent; and, 2—That the description is insufficient. On the fourth page of his brief, however, he expressly abandons the first of these objections, for the reason that both parties claim title under Magers, the grantee in this deed.

There is the same reason for abandoning the second objection to this deed, and while it is not expressly abandoned, it is in fact; for no assignment of error is based upon the ruling admitting it. This excludes it from consideration.

Supreme Court rule 21, Subdivision 2 of Sec. 4, and Sec. 8.

The first assignment of error assumes that the recital of service of notice in the judgment of *Samuel Walker* vs. *W. B. Magers*, "could not be, and is not" contradicted by the sheriff's return. When it is said the recital "could not be" contradicted, it is, I suppose, intended that the recital is conclusive, and evidence to contradict it is not admissible.

The first question, then, is, may this recital be contradicted? It is not the recital of a fact decided in the course of proceedings after jurisdiction has been obtained, but the recital of the fact conferring jurisdiction There is some difference among the authorities upon the question, whether a *domestic* judgment may be impeached by evidence *dehors* the record, contradicting the recital of jurisdictional facts; but the tendency of authority at the present time seems to be that even such a judgment may be so impeached. The subject recently underwent an exhaustive discussion, in the Supreme Court of Kansas, in the case of *Mastin* vs. *Duncan*, reported in the *American Law Register* for September, 1878, where it was held that the judgment might be so attacked; and there are numerous other cases in which the same has been held after thorough consideration.

Bolton vs. *Jacks*, 6 Robertson, 166.

Boyland vs. *Boyland*, 18 Ill., 551.

The right to dispute the jurisdictional recitals of a judgment *by other parts of the record*, as by the officer's return, is unquestioned.

Galpin vs. *Page*, 18 Wall, 350.

This question of the right to impeach a judgment by evidence of want of jurisdiction, is settled, so far as Oregon is

concerned, by legislative enactment. By Section 731 of the Civil Code of Oregon, it is provided:

> Any judicial record may be impeached, and the presumption arising therefrom overcome, by evidence of a want of jurisdiction in the court or judicial officer, or collusion between the parties, or of fraud in the party offering the records, in respect to the proceedings.

But the judgment of the State Court, in the case of *Samuel Walker* vs. *W. B. Magers*, is, when offered in the Federal Court, to be treated as a *foreign* judgment, so far as concerns the question of the right to contradict its jurisdictional recitals.

Galpin vs. *Page*, *3* Sawyer, *93*.

Pennoyer vs. *Neff*, 5 Otto, *714*.

And the judgment being considered foreign for this purpose, the recital of facts conferring jurisdiction may be contradicted by the record or otherwise.

Harris vs. *Hardman*, 14 How., 334.

Thompson vs. *Whitman*, 18 Wall., 457.

Knowles vs. *Gaslight and Coke Co.*, 19 Wall., 58.

Earle vs. *McVeigh*, 1 Otto, 503.

Pennoyer vs. *Neff*, *ut supra*.

Hoffman vs. *Hoffman*, 46 N. Y., 30.

People vs. *Dawell*, 25 Mich., 247.

Rape vs. *Heaton*, 9 Wis., 328.

In the leading case of *Starbuck* vs. *Murray*, 5 Wendell, 148, cited with approval by this Court in *Harris* vs. *Hardman*, *ut supra*., the Court say: "The Courts of Connecticut, Pennsylvania, New Hampshire, New Jersey and Kentucky, have also decided that the jurisdiction of the court rendering

a judgment, may be inquired into, when a suit is brought in the courts of another state, on that judgment." After remarking that this doctrine does not depend upon adjudged cases merely, but rests on the enduring principles of natural justice, the same Court say : "If the defendent had not proper notice of, and did not appear to, the original action, all the State Courts, with one exception, agree in opinion, that the paper introduced as to him, is no record; but if he cannot show, even against the pretended record, that fact, on the alleged ground of the uncontrollable verity of the record, he is deprived of his defence, by a process of reasoning that, to my mind, is little less than sophistry. The plaintiffs, in effect, declare to the defendant,—the paper declared on is a record, because it says you appeared ; and you appeared because the paper is a record. The appearance makes the record uncontrollable verity, and the record makes the appearance an unimpeachable fact ! Unless a court has jurisdiction, it can never make a record which imparts uncontrollable verity to the party over whom it has usurped jurisdiction."

This is, at once, the language of the law and of natural justice. This decision was afterward upheld in the case of *Holbrook* vs. *Murray*, 5 Wend., 161.

In *Marx* vs. *Fore*, 51 Mo., 69, the Court say that "the reasoning of Marcy in *Starbuck* vs. *Murray*, as quoted and approved in *Harris* vs. *Hardman*, is unanswerable."

The service of notice upon the defendant in *Walker* vs. *Magers* is not claimed to have been personal service, but constructive merely. The Circuit Court of Oregon for Marion County, was, therefore, in entering judgment in that case, a court of inferior jurisdiction, whose record does not import verity, but must show at every stage of its proceedings, the requsite facts to confer jurisdiction.

In *Galpin* vs. *Page*, 3 Sawyer, 93, Mr. Justice Field laid down the same rule which was afterwards endorsed and affirmed in *Pennoyer* vs. *Neff*, cited above. In *Galpin* vs. *Page*, the Court further say that "no presumption exists in favor of the judgments of courts of *general jurisdiction*, except as to matters and persons falling within the scope of that general jurisdiction. When the proceeding is *special* and outside of the general scope, either as to subjects or persons, the presumption ceases, and the record must show a compliance with the special authority by which the extraordinary jurisdiction is exercised."

Proceeding, then, upon the assumption that the recital of the fact of service, in the judgment in the case of *Samuel Walker* vs. *W. B. Magers* might be contradicted in the Circuit Court of the United States, the question arises: Was it contradicted by the record introduced by defendant in error? The record introduced for that purpose consists of the complaint (with the two notes attached,) the notice endorsed on the complaint, and the sheriff's return of service of the notice. Along with these was introduced the judgment, merely for the purpose of connecting all the proceedings by showing the entire record. It is conceded by counsel for plaintiff in error, in his second assignment of error, (page 7 of his Brief), that his objection to the introduction of the judgment must stand or fall by the decision of the question as to the admissibility of the other parts of the record. But it is urged that if the judgment could be impeached, the only record which could be admitted for that purpose, was the judgment roll; and the Statutes of Oregon, of 1855, p. 119, Sec. 61, is cited, to show of what the judgment roll should consist. That statute has no applicability to this case, and in fact, was not in force when the judgment in *Walker* vs. *Magers* was rendered, nor when that action was commenced. By an act of the legislature of

Oregon, passed December 10, 1856 (Session Laws of 1856–7, page 18), entitled: "An act to conform the practice of the courts to the act of congress of August 16, 1856," the writ of summons was abolished, and a notice to the defendant endorsed on the complaint, was substituted therefor. Section 3 of that Act reads:

SEC. 3. Writs of summons are abolished, except in the admiralty and United States causes, and instead thereof, a notice signed by the plaintiff or his attorney, shall be endorsed upon, or appended to the complaint and served as a summons which may be substantially as follows:

"To ———: You are hereby notified that unless you appear in the district court of the —— judicial district of the Territory of Oregon, on the first day of the term to be held —— on the —— day of —— 18—, and answer the within (or annexed) complaint, the same will be taken for confessed, and the prayer thereof will be granted by the court." Which complaint and notice may be served by any sheriff within his county, or otherwise according to law, and shall be returned to the court designated in the notice.

By the same act (§ 14, page 22 of Session Laws of 1856-7) a new provision was made as to what should constitute the judgment roll. This section, 14, reads:

SECTION 14. In cases of judgment by default, the judgment roll shall consist of copies of the complaint and notice, with the proof of service, and a copy of the judgment or decree. In cases of judgment after appearance, the notice and proof of service shall be omitted, and the roll shall consist of copies of the pleadings, and of the verdict, report, or award, if any, and of the judgment or decree. If other matters are included, without the order of the judge, the fees for such excess shall be disallowed."

This, by implication, repeals the section of the Statute of 1855, referred to by counsel for plaintiff in error.

Subsequently, by an act of the legislature, entitled "An act to change the practice and fix the time for holding courts," passed January 17, 1859, (acts of Territorial Legislature ending January 22, 1859, page 25,) the act of December 10, 1856, above quoted, was repealed, and all acts which had

been repealed by that act, were revived. Section 1 of the act of January 17, 1859, reads:

SECTION 1. Be it enacted, etc., * * That the act entitled "An act to conform the practice of the courts to the act of Congress of August 16, 1856," passed December 10, 1856, is hereby repealed, except as to United States and admiralty cases, and that all acts and parts of acts thereby and not otherwise repealed, are hereby revived, except as hereinafter specified.

Section 2, so far as it relates to actions at law, reads:

SECTION 2. The writs of summons, except in admiralty and United States causes, are abolished, and instead thereof, a notice signed by the complainant, his solicitor or attorney, shall be endorsed upon or appended to the complaint, and served as a summons, which may be substantially as follows: To ———: You are hereby notified that unless you appear in the district court in the county of ——, in the Territory of Oregon, on the —— day of ——, 18—, and answer the within (or annexed) complaint, the same will be taken for confessed and the prayer thereof will be granted by the court." Which complaint and notice may be served by any sheriff within his county, or otherwise according to law, and shall be returned to the court designated in the notice. * * *

Section 10, of this act, is another repealing section, and reads:

SECTION 10. All acts and parts of acts fixing the terms of the supreme and district courts, or otherwise contravening the provisions of this act are hereby repealed.

Later in 1859, the Legislature of the State of Oregon, (the first session under the State government,) by Section 5 of an act approved June 4, 1859, entitled, "An act to regulate the practice of the supreme and circuit courts," (laws of this session, page 17,) continued the notice to defendant in lieu of the writ of summons. This section 5 reads:

SECTION 5. Writs of summons are abolished, and instead thereof, a notice, signed by the complainant, his attorney, or solicitor, shall be endorsed upon or appended to the

complaint, and served as a summons, which may be substantially as follows:

To ———: You are bereby notified that unless you appear in the Circuit Court of the State of Oregon, for the County of———, on the —— day of———, and answer the within (or annexed) complaint, the same will be taken for confessed and the prayer thereof will be granted by the Court; which complaint and notice may be served by the sheriff within his county, or otherwise, according to law and shall be returned to the clerk of the Circuit Court designated in the notice, but in all suits of equity the defendant may be brought into court, either by the service of the complaint and notice as herein provided, or by subpœna, as provided in Title 1, of Chapter 1, of the Statutes of Oregon, regulating proceedings in suits in equity, and no defendant in equity shall be required to plead answer or demurrer to a complaint before the expiration of twenty days after service upon him.

By Section 10 of this last act, the act of January 17, 1859, and December 10, 1856, above cited, were expressly repealed. This Section, so far as relates to the repeal of the acts in question, reads:

SECTION 10. The act of the Legislative assembly, passed January 17, 1859, entitled, "An act to change the practice and fix the time for holding the courts," and the act of the 10th of December, 1856, hereinbefore referred to * * * are hereby repealed.

Thus were all the prior acts requiring, or providing for, a judgment roll, swept away by the law of June 4th, 1859. But in that act there was no provision for a judgment roll in any case, and there was no further legislation on the subject until October, 1862, when the present law was passed which took effect June 1, 1863.

But the action of *Samuel Walker* vs. *W. B. Magers*, was commenced September 3, 1861, and the judgment therein was taken September 17, 1861.

Record, folios 59 and 68.

So it will be perceived no judgment roll was required in that case, there being then no law in existence on that subject. But were it otherwise, there was substantially a judgment roll introduced, for all the papers necessary to make such roll were introduced.

But, to take the plaintiff in error on his own ground, suppose it be assumed that a judgment roll was required at the time that the judgment in *Walker* vs. *Magers* was taken, does it follow that only such judgment roll could be introduced as the record of the case? The judgment roll is a record of no higher class, when offered in evidence, than any other part of the record of the case. The record is defined by the Code (§ 719, page 254) thus:

A judicial record, is the record, official entry or files of the proceedings in a court of justice, or of the official act of a judicial officer, in an action, suit or proceeding.

In *Galpin* vs. *Page*, 3 Sawyer, 3, the learned judge who delivered the opinion of the court, declared that the record of a case comprises "a history of all the acts and proceedings in the action, from its initiation to final judgment." In *Neff* vs. *Pennoyer*, 3 Sawyer, 287, the able judge of the Circuit Court for the District of Oregon, in commenting upon the foregoing quotation, remarks that "a part of this record or history is at least all the papers filed in the case and upon which the court appears to have acted in any step of the proceedings. So are the entries and files containing the acts and doings of the court in the case. And these are all verities in the same sense, and in the same degree, as the portion of them which by statute constitutes the judgment roll. * * * There is nothing in Section 269 (which is the same now as it was in 1855) prescribing how the judgment roll shall be made up, which expressly or by implication, makes it the record of the case or that imparts to it any more or greater

verity, than the rest of the record. As has been already remarked, the judgment roll is not the whole record of the case but only a collection of such of the papers and entries as in the opinion of the legislature, were necessary or sufficient to show a *prima facie* case of jurisdiction in the court to pronounce on the judgment."

I admit the fact to be, as suggested by counsel for the plaintiff in error, that no formal or technical judgment roll was made up in *Walker* vs. *Magers*, unless the putting of the papers in the case together in an envelope and filing them away, may be considered the making up of such roll; but in reply to the gratuitous intimation that some of the papers might possibly have been abstracted, I submit that if any judgment roll had been required by law at that time, it is quite as likely that such remissness on the part of ministerial officers, (as this court is aware is only too common in the early history of all the new States,) is to be attributed to ignorance, misconstruction of the law, carelessness, or design of parties interested in bolstering up an otherwise defective judgment, as that any part of the record has been abstracted.

Having, as I think, shown that the record introduced by defendant in error on the trial, is a record of such character as entitles it to be read in evidence against the recital of service in the judgment entry in *Walker* vs. *Magers*, it remains to be considered whether it does in fact show a want of jurisdiction in the court to render the judgment. If so, it was properly admitted.

No personal service of process was had upon the defendant in *Walker* vs. *Magers*. On the contrary an attempt was made to make a constructive service of notice. The return of the sheriff endorsed on the notice upon the complaint in that action, reads as follows :

"STATE OF OREGON, } ss.
MARION COUNTY, }

I certify that I have this the 2d day of September, 1861, served the within complaint and notice by delivering to the wife of Wm. B. Magers, a white woman of over 14 years of age, at the usual place of abode, a copy of the same, in Marion County, Og'n.

GEO A. EDES,
Sheriff Marion County,
By WM. BARKER Deputy."

Record, folio 70.

This being an attempt to procure a statutory or constructive service of process, out of the course of the common law, the proceeding of the court upon such service being in derogation of the common law, and the court being, therefore, as to that matter, a court of inferior, rather than superior, jurisdiction, as already shown, the judgment was void unless the statute was strictly followed.

Galpin vs. *Page, ut supra.*

Thompson vs. *Whitman, ut supra.*

Boyland vs. *Boyland, ut supra.*

Harris vs. *Hardman, ut supra.*

Was the statute relating to service strictly followed in *Walker* vs. *Magers?* It cannot be claimed that it was. The Statute in force at that time upon this subject, (Statutes of Oregon of 1855, page 86, § 29), reads as follows:

SEC. 86. The summons shall be served by delivering a copy thereof together with a copy of the complaint prepared by the plaintiff, his agent or attorney, as follows:

1. If the action be against a corporation * * * * *
2. If against any county * * * *
3. If against a minor * * * *
4. If against a person of unsound mind * * * *
5. In all other cases to the defendant personally, or if he be not found, to some white person of the family, above the

age of fourteen years at the dwelling-house or usual place of abode of the defendant.

(The parts of the section omitted, where the asterisks occur in the above quotation, simply prescribe the mode of service in the general classes of cases indicated.)

A comparison of the return in question with the provisions of the statute, will show that some essential features requisite to the validity of the constructive service provided for by the statute are lacking. The fact that the defendant *could not be*, or *was not found*, the only basis and excuse for such service, is nowhere stated. Nor does it show that the papers were left at the dwelling-house, or usual abode of the defendant. It does not show at whose abode it was left. He and his wife may have been separated.

In the case of *Harris* vs. *Hardman, supra*, the Supreme Court of the United States, held a judgment based upon a similar return, not merely voidable but *void.*

In *Trullinger* vs. *Todd*, 5 Oregon 37, a judgment was entered by default against the defendant, based upon the following return: "I served the within summons, within said state and county, on the within named J. C. Trullinger, by delivering a copy thereof * * * to a white person of the family above the age of fourteen years, at the dwelling house of the defendant." The statute here was the same, as to this class of service, as the one in force at the time of the proceedings in *Walker* vs. *Magers.* The Supreme Court of Oregon say that because the sheriff's return does not show that the defendant *could not be found*, the judgment is void. In considering the question whether an appeal would lie in such a case, the Court say, that "while it appears to be generally considered that a void judgment may be disregarded and treated as a nullity whenever any right is claimed under such judgment, whether it has been appealed from or not, it appears also to be the constant practice for courts of review

to entertain appeals from such judgments for the purpose of reversing and purging the record of such judgments," thus clearly intimating not only that such pretended judgments may be attacked any where, but that an apology is rather necessary for entertaining an appeal therefrom.

On page 29 of the Brief of plaintiff in error, it is stated that "the cases of *Heatherly* vs. *Hadley* and *Tustin* vs. *Gaunt*, decided by the Supreme Court of Oregon, were much relied on by counsel for defendant in error in the court below, as favoring their position;" and plaintiff in error comments on these cases.

The case of *Heatherly* vs. *Hadley* is first reported in 2 Oregon, 269.

Heatherly and wife brought a suit to set aside a decree of foreclosure of a mortgage, on the ground that the court rendering the decree had not jurisdiction. The defendant answered, alleging that in the suit to foreclose, the service was sufficient to give the court jurisdiction of the persons of the defendants in the suit, and in addition to the general allegation of service, also set out in full, the proof of service as quoted by plaintiff in error at page 20 of his Brief.

The defendant made a motion for a decree upon the pleadings, and the court below allowed the motion and rendered a decree. The case was appealed to the Supreme Court, upon the record as above presented. The only question presented to the Supreme court was whether the proof of service (as set forth by plaintiff in error at page 20 of his Brief) was sufficient to give the Court jurisdiction, and the Supreme Court held that it was not.

Heatherly vs. *Hadley*, 2 Oregon, 269.

The decree of the court below having been reversed and the cause sent back for trial, it was brought to the Supreme Court again, and the question presented above was submitted

and decided the same way a second time by the Supreme Court of Oregon.

Heatherly vs. *Hadley*, 4 Oregon, 1.

This last is the citation of the case made by plaintiff in error.

The case of *Tustin* vs. *Gaunt*, 4 Or., 305, is quoted by counsel for plaintiff in error. In that case, it will be seen that nothing in the record showed how service had been made. The court say at the farthest, that the record of a court of *general* jurisdiction cannot be impeached by evidence *aliunde* the record. This was in the case of a domestic judgment, and was based upon the authority of *Hahn* vs. *Kelley*, 34 Cal., 391.

The cases of *Quivey* vs. *Porter*, 37 Cal., 463, and *Quivey* vs. *Baker*, 37 Cal., 465, cited by counsel for plaintiff in error, followed *Hahn* vs. *Kelley*, also relied upon by him. This case, somewhat celebrated for the extreme lengths which the court went in invoking presumptions to sustain a faulty record, has however been severely criticised and overruled by this court, in *Galpin* vs. *Page*, *supra*, as well as by several state courts of last resort.

The case of *Ladd* vs. *Higley*, 5 Oregon 296, cited by counsel for plaintiff in error, I submit is not in point. In that case the sheriff's return showed personal service on the defendant within the proper county, and the judgment entry also recited the same. No evidence to impeach the record was offered, and the only objection to it was a quibble as to who made the service, and that, too, when the return was duly signed by the sheriff of the proper county ! It is not strange, then, that upon these facts the court in that case should have remarked that nothing short of a clear contradiction in the roll could affect these recitals. It is worthy of note, also, that the language of the Court in that case contains a pretty clear im-

plication that even a sheriff's return, showing personal service, might be contradicted ; and that it is only when the return does show service that a presumption of regularity will be entertained.

It may be urged that in some of the foregoing cases cited by defendant in error, the objection to the jurisdiction of the court was made in a direct attack, such as an appeal. A sufficient answer is found in the fact that the cases all agree that a judgment pronounced without jurisdiction is *void*, not merely voidable, and may therefore be attacked anywhere, collaterally as well as directly; and, in many of the cases cited, the attack was collateral.

Counsel for plaintiff in error has relied almost entirely on the doctrine of presumptions.

It should be borne in mind that in no case can the doctrine of presumptions be invoked to aid jurisdictional facts, except in cases where the record is merely silent thereon, and not where one portion of the record is contradicted by another portion; and even when silent, presumptions can be invoked in its favor only in the case of a court of superior jurisdiction proceeding in accordance with the course of the common law.

Galpin vs. *Page*, 18 Wall., 350.

Mr. Justice Field in *Gray* vs. *Larrimore*, 2 Abb. 549.

Commissioners vs. *Harper*, 38 Ill., 103.

"The presumptions in favor of proceedings of courts of record are induiged only in relation to those jurisdictional matters concerning which the judgment roll is silent ; but no presumptions in support of the judgment are to be allowed in

opposition to *any statement contained in the record.* If an act be stated in the roll as having been done in a specified manner, no presumption arises that, at some future time, the act was done in a better or more sufficient manner. *If it appear that the process was served in a particular mode, no other and different service can be presumed.* To indulge such a presumption would be to contradict the record which imports absolute verity. When, therefore, the record shows that certain steps were taken to procure jurisdiction, and the law does not consider those steps sufficient, the judgment will be regarded as void for want of jurisdiction over the defendant."

Freeman on Judgments, Sec. 125.

In the case of *Rumfelt* vs. *O'Brien*, 57 Mo., 569, cited by counsel for plaintiff in error, a return of the sheriff, showing that Rumfelt could not be found, there was a subsequent petition showing Rumfelt to be a non-resident, and an order for service on him by publication. The judgment which was afterwards given recited *due service of process* on all the defendants. There was nothing to show what had been done under the order of publication, and the record being silent on that matter, it was presumed, in favor of the judgment, that due service was made. The objection that the court was in that case an inferior court, does not appear to have been made; and treating it as a superior court, as it clearly was treated, the decision was in accordance with what we concede to be the law; but in that view, it is not in point as authority in this case.

In *Miller* vs. *Handy*, 40 Ill., 448, cited by counsel for plaintiff in error, the judgment recited two writs of *sci. fa.*, but there was only one writ among the files. The court said the presence of *one* writ did not contradict the recital of *two*. That was right. But suppose the other supposed writ of *sci. fa.* had been produced, and on examination found to be so defec-

tive as to be void, would the Court have still held the judgment unimpeached? The case would have to go to that length before it could be authority for the proposition to sustain which it is cited.

In *Kibbe* vs. *Dunn*, 5 Bissell, 234, cited by plaintiff in error at page 11 of his brief, "it was apparent that the record was not all preserved;" and the Court applying the doctrine of presumptions to supply facts not appearing in the record, and not finding that the record was contradicted by what did appear, sustained the judgment. But the case is not in point: for in *Walker* vs. *Magers* everything appears which in practice was necessary to make a complete set of papers in an action in which a judgment was taken by default. And the recitals in the judgment are contradicted by the matters which do in fact appear of record in the case.

Plaintiff in error, at page 18 of his brief, cites *Isaacs* vs. *Price*, 2 Dillon, 347; *Blasdell* vs. *Kean*, 8 Nev., 308; *Ely* vs. *Tallman*, 6 Wis., 258–9, and *Cullen* vs. *Ellison*, 13 Ohio St., 452, in support of a proposition which in this case we have no occasion to controvert. That "a distinction is to be made between a case where there is *no* service whatever, and one which is simply *defective* or *irregular*" may be conceded. In the first case the judgment is void, but in the second case it is voidable only. This case falls within the first class, for it is not contended that in *Walker* vs. *Magers* the defendant was *personally* served, and there was not, and could not, be a substituted or constructive service until it was first made to appear that personal service could not be had. The record discloses that the very fact, upon the existence of which, the Court had power under the statute to make a constructive service, was not made to appear.

Plaintiff in error at page 19 of his Brief, cites *Bonsall* vs. *Isett*, 14 Iowa, 309, and claims that the very point upon which this case was made to turn in the court below was

there decided. It is true that one of the questions presented in this case was considered in *Bonsall* vs. *Isett.* The same question had been presented to the Supreme Court of Iowa in some earlier decisions, and such a service had been held sufficient to confer jurisdiction. In *Bonsall* vs. *Isett* the Court refused to overrule the earlier decisions of the same court, but clearly intimate that such refusal was rather out of consideration of the "questionable circumstances" surrounding the case, than from any settled conviction that the law is as the court declared it to be. After using the language quoted by plaintiff in error, the Court proceed: "Counsel for appellants admit that the law upon this subject, as settled in this State, is against him, but insists that the weight of authority in other courts and States is the other way, and refers to several decisions of the Supreme Court of the United States, and especially to the case of *Harris* vs. *Hardman*, 4 How., 334, and in view of this fact, urges a reconsideration of the question. We admit the conflict of authority, but prefer to reserve a more careful examination of our adjudications upon the subject till an appellant can come before us under less qustionable circumstances." The fair inference is, that in *Bonsall* vs. *Isett* the Court recognized the fact that the clear weight of authority was against the rule it had previously established; but the Court was not willing to overrule its former decisions in the interests of an appellant whose cause seemed to be entirely without equity. Whatever may be thought of the wisdom of such a proceeding by a court of justice, yet the fact remains that even that Court had become convinced that the law is as we claim it to be.

In the case at bar the record is not silent. The sheriff's return in *Samuel Walker* vs. *W. B. Magers*, as quoted (and set out at page 70, Record), shows how the service was attempted to be procured. It is fatally defective; and the judgment thereon rendered is everywhere absolutely void. And this disposes of the suggestion of counsel for plaintiff in error,

that there might possibly have been an *alias* summons duly served, but not produced at the trial. The record shows what was done in the matter of service of the notice, and the authorities above cited show that no presumption that something else was done will be entertained.

But counsel for plaintiff in error does not, I presume, make the suggestion of a possible *alias* summons with seriousness; for at the time of the case of *Walker* vs. *Magers* the writ of summons had been abolished, and in lieu thereof a notice to the defendant was required to be endorsed on the complaint. There could therefore be no *alias* summons. There would have to be an *alias* complaint in such a case before there could be an *alias* notice. In other words, it would be necessary, in order to form a basis for the presumption contended for by counsel, that the Court should presume the entire action in which the judgment was taken was an *alias* action!

Upon the foregoing considerations, I submit that the rulings of the court below, upon which the *first* and *second* assignments of error are based, were not erroneous.

As to the *third* assignment of error, it is sufficient to say, that if the record introduced by defendant in error to impeach the judgment in *Samuel Walker* vs. *W. B. Magers* was properly admitted, there was nothing for the jury to decide concerning the record. It was for the court, and not the jury, to determine what was the legal effect of the record as evidence.

This evidence, therefore, furnishes nothing for the jury to consider; and, as there was no attempt or offer on behalf of plaintiff in error to present any evidence in opposition to this record, there was nothing to be submitted to the jury. The decision upon this assignment of error, therefore, depends entirely on the question whether there was error, as stated in the *first* and *second* assignments.

The *fourth* assignment of error, likewise, depends upon the first and second. If there was not error, as alleged in the first and second assignments, the defendant in error showed a complete record title in himself, and the alleged title of the plaintiff in error was shown by record evidence to be void. The entire matter, therefore, depended upon record evidence, the effect of which the Court, and not the jury, were required to determine. It was, therefore, the duty of the Court to direct a verdict for the plaintiff (defendant in error).

We respectfully submit that the rulings of the court below, which ~~we~~ assigned as error, are sustained both upon principle and upon authority, and that the judgment should be affirmed.

W. LAIR HILL,
W. Carey Johnson
Attorneys for Defendant in Error.